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## Textualism and Jurisdiction

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# TEXTUALISM AND JURISDICTION

(Forthcoming, Columbia Law Review)

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\* Professor, George Washington University Law School. This article benefited greatly from thoughtful comments from Thomas Colby, Barry Friedman, David Fontana, Chip Lupu, Jim Pfander, and Amanda Tyler.

# TEXTUALISM AND JURISDICTION

## ABSTRACT

*This paper seeks to test textualists' central claims—that their approach is most consistent with the faithful-agent conception of the judicial role in statutory interpretation and more likely to constrain judges' capacity to do mischief under the guise of statutory interpretation—by critically examining the manner in which textualists have interpreted jurisdictional statutes. In addition, it considers descriptive and normative implications of textualists' treatment of jurisdictional statutes for the long-standing debate about the extent of Congress's authority to control the jurisdiction of the federal courts. If textualist judges are supposed to act as faithful agents of Congress, following the plain meaning of statutory text, then when Congress confers jurisdiction without qualification, we would expect textualist judges to eschew arguments for implicit exceptions to the exercise of jurisdiction. In practice, however, although the Court's textualists have strictly read statutes that purport to divest the federal courts of jurisdiction, they have not been as consistent in relying on the plain language of statutes that appear to confer expansive grants of jurisdiction. The Court's textualists' treatment of jurisdictional statutes suggests that the textualists' urge to constrain judicial power has sometimes trumped their competing demand that courts act as faithful agents of Congress by considering only the plain meaning of statutory language. This has implications for both textualism and the larger question of the proper relationship between Congress and the courts in crafting a jurisdictional regime, and should force textualists to defend their approach more explicitly as a device for constraining judicial authority.*

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## CONCLUSION

*“[Federal courts] have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.”*

*-Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.)

## INTRODUCTION

Congressional control over federal court jurisdiction is a hot topic once again.<sup>1</sup> Last term, the Supreme Court invalidated Congress’s effort to strip the federal courts of jurisdiction to entertain habeas petitions from aliens detained at Guantanamo Bay,<sup>2</sup> and the House of Representatives has recently considered several bills that would strip all federal courts of jurisdiction to consider various controversial subjects.<sup>3</sup> These congressional actions are the latest skirmishes in a long-standing battle over the proper relationship between Congress and the federal courts in matters of federal-court jurisdiction.

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<sup>1</sup> See, e.g., James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 234-38 (2007) (*hereinafter* “Pfander, *Federal Supremacy*”); see also Steven G. Calabresi & Gary Lawson, *The Unitary Executive and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002 (2007); Laurence Claus, *The One Court That Congress Cannot Take Away: Singularity, Supremacy, and Article III*, 96 GEO. L.J. 59 (2007).

<sup>2</sup> *Boumediene v. Bush*, \_\_\_ S. Ct. \_\_\_ (2008) (reviewing Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(1) & (2), 119 Stat. 2739, 2742, to be codified as amended at 29 U.S.C. § 2241(e)(1), and Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 7(a), 120 Stat. 2600, 2636, to be codified at 28 U.S.C. § 2241(e)(1)).

<sup>3</sup> See Constitution Restoration Act of 2005, H.R. 1070, 109<sup>th</sup> Cong. (depriving federal courts of jurisdiction over suits concerning the acknowledgment by a state or federal government entity or officer of “God as the sovereign source of law, liberty, or government”); Marriage Protection Act of 2005, H.R. 1100, 109<sup>th</sup> Cong. (depriving federal courts of jurisdiction over questions pertaining to provisions of the Defense of Marriage Act, 28 U.S.C. § 1738C, freeing states from an obligation to recognize same-sex marriages entered lawfully in other states); Sanctity of Life Act of 2005, H.R. 776, 109<sup>th</sup> Cong. (depriving federal courts of jurisdiction over claims challenging state and local laws that protect fetuses or regulate abortion); Pledge Protection Act, H.R. 2389, 109<sup>th</sup> Cong. (depriving federal courts of jurisdiction over claims involving the constitutionality of the pledge of allegiance). The House passed the Pledge Protection Act on May 17, 2005, but the Senate did not take up the bill.

For a long time, the jurisdiction-stripping debate has remained largely academic because the Court has largely avoided it. But as an academic debate, it has been quite heated, pitting proponents of the traditional view that Congress has virtually plenary power over the jurisdiction of the federal courts<sup>4</sup> against proponents of various theories of mandatory jurisdiction, which if nothing else impose substantial limits on Congress's power to deprive federal courts of jurisdiction over certain matters.<sup>5</sup> The debate over the power of courts to *decline* to exercise jurisdiction that Congress ostensibly has conferred has been equally robust. On one side are advocates of the strong congressional-control view, which holds that the separation of powers and the notion of legislative supremacy prevent the courts from abstaining from the exercise of congressionally conferred jurisdiction.<sup>6</sup> An opposing group of scholars argue that courts both traditionally have exercised, and ought to exercise, substantial discretion in matters of jurisdiction.<sup>7</sup> The divergent views on the virtues and validity of jurisdiction-stripping and judicial abstention stem directly from competing visions of the appropriate relationship between Congress and the federal courts in crafting a jurisdictional regime.

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<sup>4</sup> See, e.g., Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030 (1982); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984); John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203 (1997); Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900 (1982); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001 (1965); see *infra* Part I. Although the scholars in this camp have argued that Congress has essentially plenary authority, many of them have urged Congress to refrain from exercising its broad power. See Bator, *supra* note 4, at 1037–38; Gunther, *supra* note 4, at 909–10.

<sup>5</sup> See, e.g., Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 206, 229–30 (1985); Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L. J. 498, 504–13 (1974); Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 66 (1981); see *infra* Part I. Still others have offered something of a middle ground, developing a dialogic model for federal jurisdiction under which Congress and the courts engage in a lengthy conversation about the appropriate boundaries for the courts' jurisdiction. See Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1 (1990) (*hereinafter*, "Friedman, A Different Dialogue"); cf. James E. Pfander *Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism*, 148 U. PA. L. REV. 109, 154–160 (1999) (*hereinafter* "Supplemental Jurisdiction") (arguing for role for judicial discretion in crafting a jurisdictional regime).

<sup>6</sup> See, e.g., Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE. L.J. 71 (1974) (*hereinafter*, "Redish, Abstention").

<sup>7</sup> See, e.g., David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985) (*hereinafter*, "Shapiro, Jurisdiction and Discretion").

Since the debate over congressional control of federal jurisdiction last flared in full force,<sup>8</sup> there has been a revolution in methodological approaches to statutory interpretation. Beginning in the mid-1980s, several prominent judges and scholars urged courts to accept textualism as the only proper methodology for interpreting statutes.<sup>9</sup> Textualism posits that courts are bound by a statute's plain meaning, and that consideration of legislative history, spirit, or purpose is inappropriate in attempting to discern statutory meaning.

Like the debate over congressional control of federal court jurisdiction, the debate over textualism is largely about the courts' relationship to Congress. The textualist approach derives from various legal traditions. On its surface, textualism echoes the "plain-meaning" school of interpretation that was dominant in the nineteenth century, but modern textualists have developed a much richer account of the judicial role in interpreting statutes. Although textualists draw on legal realism's insights about the fictions of collective intent or purpose, they envision a much narrower judicial role than did the legal realists. Indeed, modern textualism is offered as a response to the perceived excesses of purposivism, which often appeared to be a simple guise for judges to produce results with which they personally agreed. Accordingly, textualists defend their approach by arguing that it meaningfully constrains judges.<sup>10</sup> Textualists insist that in interpreting statutes, courts should act as faithful agents of Congress, treating the language of the statute as the legislative instructions that they are bound to follow.<sup>11</sup> Any other approach to interpretation, they assert, undermines the rule of law and legislative supremacy.

Textualism might not be the dominant approach to statutory interpretation among academics or judges generally,<sup>12</sup> but it appears that several justices—clearly Justice Scalia and Thomas, and perhaps Chief Justice Roberts and Justices Alito and Kennedy—on the Supreme

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<sup>8</sup> Some of the most provocative thinking about Congress's power over federal-court jurisdiction took place in the early- to mid-1980s, after Congress considered scores of proposals to strip the federal courts of jurisdiction over various controversial issues. See, e.g., Sager, *supra* note 5; Amar, *supra* note 5.

<sup>9</sup> See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 14-37 (Amy Gutmann ed., 1997); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y, 61, 68 (1994).

<sup>10</sup> See, e.g., Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 26 (2006); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 79 (2000); Caleb Nelson, *A Response to Professor Manning*, 91 VA. L. REV. 451, 455 (2005).

<sup>11</sup> See, e.g., John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 15-18 (2001); Molot, *supra* note 10, at 6-29.

<sup>12</sup> See Molot, *supra* note 10, at 29.

Court now consider themselves textualists.<sup>13</sup> (I will employ the term “the Court’s textualists” to refer to these five Justices.) More important, textualism has had a significant influence on both judicial decision-making and the on-going scholarly debate over the appropriate judicial role in statutory interpretation. As a result, comparatively few judges and scholars now openly advance the strong purposivist approach to statutory interpretation that once prevailed. In the aftermath of textualism’s rise, even non-textualists concede that they think more about text, proclaim their waryiness of legislative history, and express sympathy to the call for constraints on the judicial role in statutory interpretation.<sup>14</sup>

The influence of textualism on how jurists think about the courts’ relationship to Congress demands a reevaluation of the competing perspectives on the proper roles of Congress and the courts in crafting a jurisdictional regime. In light of this influence, we would expect to see, at least as a positive matter, more strict interpretation of jurisdictional statutes, and a vindication, at least as a descriptive matter, for the strong congressional-control models. After all, if the textualist judge is supposed to act as a faithful agent of Congress by following the plain meaning of statutory text, then when Congress plainly withdraws jurisdiction, faithfully

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<sup>13</sup> Justice Scalia is a self-professed textualist, *see* Scalia, *Common-Law Courts*, *supra* note 9, at 23-25, as is Justice Thomas, *see, e.g.*, *Lawrence v. Florida*, 127 S. Ct. 1079 (2007). Justice Kennedy has given indications recently that he is inclined towards textualist approaches to statutory interpretation. *See, e.g.*, *Exxon Mobil Corp. v. Allapattah Serv., Inc.*, 545 U.S. 546 (2005); *Hibbs v. Winn*, 542 U.S. 88 (2004) (Kennedy, J., dissenting). It is somewhat less clear whether Justice Alito considers himself a textualist. There are some indications that he does, *see Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. To Be An Associate Justice of the Supreme Court of the United States: Hearing Before the Senate Comm. on the Judiciary*, 109<sup>th</sup> Cong., 2d Sess. 350 (2006) (“When I interpret statutes—and that’s something that I do with some frequency on the Court of Appeals—where I start and often where I end is with the text of the statute. And if you do that, I think you eliminate a lot of problems involving legislative history and also with signing statements.”); *Woodford v. Ngo*, 126 S. Ct. 2378 (2006) (Alito, J.); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2516 (2007) (Alito, J., concurring); *BP America Prod. Corp. v. Burton*, 127 S. Ct. 638 (2006), but also some evidence that he does not; he joined Justice Souter’s arguably non-textualist partial dissent in *Limtiaco v. Camacho*, 127 S. Ct. 1413 (2007), and in *Zuni Public School District No. 89 v. Department of Education*, 127 S. Ct. 1534 (2007), he declined to join Justice Scalia’s textualist dissent. It is also unclear whether Justice Roberts considers himself a textualist, *see, e.g.*, *Confirmation Hearing on the Nomination of John Roberts to Be Chief Justice of the Supreme Court of the United States: Hearing Before the Senate Comm. on the Judiciary*, 109<sup>th</sup> Cong., 1<sup>st</sup> Sess. 319-20 (2005) (stating some willingness to consider legislative history in certain circumstances), but in his short time on the bench he has generally joined opinions by the Court’s textualists, *see, e.g.*, *Zuni*, 127 S. Ct. at 551 (Scalia, J., dissenting, joined by Roberts, C.J.); *Powerex Corp. v. Reliant Energy Serv., Inc.*, 127 S. Ct. 2411 (2007) (Scalia, J., joined by Roberts, C.J.); *Lawrence v. Florida*, 127 S. Ct. 1079 (2007) (Thomas, J., joined by Roberts, C.J.). Some commentators have already concluded that Chief Justice Roberts and Justice Alito effectively are textualists. *See, e.g.*, John F. Duffy, *In re Nuijten: Patentable Subject Matter, Textualism and the Supreme Court*, PATENTLY-O (2007), available at <http://www.patentlyo.com/patent/DuffyOnNuijten.pdf> (last visited August 13, 2007); Julia K. Stronks, *Breyer v. Scalia: Will Alito Be an Activist or a Textualist?*, SEATTLE TIMES (Jan. 15, 2006).

<sup>14</sup> Molot, *supra* note 10, at 3-4.

textualist judges can be expected to decline to exercise authority; and if Congress confers jurisdiction without qualification, then we would expect textualist judges—putting aside, for a moment, the any constraints imposed by judicial precedent or canons of construction—to eschew arguments for implicit exceptions to the exercise of jurisdiction. Yet in practice, textualism’s impact on the relationship between Congress and the courts in crafting the jurisdictional regime has been more uneven.

To be sure, in recent years, textualists have often offered plain-meaning constructions of jurisdictional statutes. But the Court’s textualist Justices have been considerably more willing to apply strict textualist approaches to jurisdictional statutes that *limit*, rather than expand, federal-court jurisdiction. For example, the Court’s textualist Justices have strictly construed the habeas provisions of the Anti-Terrorism and Effective Death Penalty Act, which limit the power of federal courts to entertain habeas petitions, even though for the twenty years preceding that statute’s enactment the Court had regularly announced extra-textual limitations on the courts’ habeas jurisdiction under the older habeas statute. But textualism has not yet had a similarly profound impact on the judicial construction of jurisdictional statutes that by their terms do not admit of clear exceptions. The Court’s textualist Justices have continued to find extra-textual reasons to decline to exercise jurisdiction under those statutes.

Indeed, courts often interpret jurisdictional statutes based on something other than plain statutory language. The diversity statute contains no exception for cases involving family law or probate, but the Court has excepted such cases from the statutory grant of jurisdiction.<sup>15</sup> The federal question statute is almost identical to Article III’s grant of “arising under” jurisdiction, yet the Court has implied a well-pleaded complaint rule for the former but not for the latter.<sup>16</sup> And although that statute says nothing about abstention in certain classes of cases,<sup>17</sup> the Court has departed from statutory text on several notable occasions in developing its abstention doctrines.<sup>18</sup>

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<sup>15</sup> *Ankenbrandt v. Richards*, 504 U.S. 689 (1992).

<sup>16</sup> *Rivet v. Regents Bank of Louisiana*, 522 U.S. 470 (1998).

<sup>17</sup> Indeed, a different statute does, and that statute is limited to particular, congressionally defined categories of cases. *See* 28 U.S.C. § 2283 (“A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”).

<sup>18</sup> *See, e.g., Railroad Comm’n of Texas v. Pullman Co.*, 312 U.S. 496 (1941); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Younger v. Harris*, 401 U.S. 37 (1971); *Colorado River Water Conservation Dist. v. United States*, 424 U.S.



The rise of the “new textualism”<sup>19</sup> has not had a significant impact on the interpretation of these statutes. To be sure, many of the general grants of jurisdiction are old, and judicial interpretations are deeply ensconced in the jurisdictional regime; it is unrealistic to expect even a revolution in interpretive methodology to dislodge settled interpretations of statutory text, as the force of *stare decisis* is particularly strong in the context of statutory interpretation.<sup>20</sup> In addition, there are other reasons—such as federalism and comity to state courts—why the Court has continued to decline to exercise jurisdiction that Congress appears to have granted in the plain text of its enactments. But as it turns out, these reasons are at best only part of the explanation for why textualism has not fully vindicated the congressional-control model of federal jurisdiction.

In practice, textualism’s application in the jurisdictional context has put its principal aims at war with each other. Textualism’s proponents advance two principal claims in support of the approach. First, they argue that the concepts of legislative supremacy and the faithful agency of courts to Congress require judges to give force only to the text of statutes, as opposed to other, more malleable indications of legislative purpose.<sup>21</sup> Second, they assert that this approach more effectively constrains the power of judges, which should be limited in a democratic society.<sup>22</sup> As applied in most contexts, the textualists’ strict adherence to statutory text in determining statutory meaning effectuates both the specific goal of ensuring faithful agency and the more general goal of constraining judicial authority. But in the context of jurisdictional statutes, being a faithful agent of Congress, as determined by plain statutory text, often requires an expansion of, rather than a limitation on, judicial power. Read according to their plain text, most of the principal statutory jurisdictional grants would require the federal courts to assume jurisdiction in a much broader class of cases than they currently do under decidedly atextual readings of the statutes. Textualism is largely about the properly limited judicial role in a democratic society,

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800 (1976). In announcing its abstention doctrines, the relevant jurisdiction-granting statute has usually been 28 U.S.C. § 1331, the general federal question statute.

<sup>19</sup> William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

<sup>20</sup> See *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-173 (1989).

<sup>21</sup> Scalia, *supra* note 9, at 17 (“Men may intend what they will; but it is only the laws that they enact which bind us.”).

<sup>22</sup> See, e.g., Easterbrook, *Text, History, and Structure*, *supra* note 9, at 63 (“We are supposed to be faithful agents, not independent principals. Having a wide field to play—not only the statute but also the debates, not only the rules but also the values they advance, and so on—liberates judges. This is objectionable on grounds of democratic theory as well as on grounds of predictability.”); *infra* Part II.

but being a truly faithful agent in the jurisdictional context would often require a less limited role for the courts than some textualists might otherwise prefer. It turns out that the textualists' urge to constrain judicial power has often trumped the textualists' demand that courts act as faithful agents of Congress by considering only the plain meaning of statutory language in deciphering Congress's instructions.

My point is not that textualism's somewhat erratic application in the context of jurisdictional statutes necessarily undermines textualism's normative appeal. There are powerful arguments—constitutional, institutional, and otherwise—for limiting judicial power, and the Court's recent interpretations of jurisdictional statutes can be justified on these grounds. But the account that I develop here does suggest that, contrary to textualists' frequent claims, textualism in practice has sometimes been less about fidelity to Congress's legislative supremacy and more about constraining judicial authority. This may or may not be fatal for textualism, but it should force proponents of the approach to defend the theory more explicitly on those terms, rather than as a methodology for more accurately divining congressional intent.<sup>23</sup> Equally important, the selective application of textualism suggests that the long-standing question about the proper relationship between Congress and the federal courts in crafting a jurisdictional regime is, in an era of the textualist ascendancy, a considerably more nuanced question than one might expect at first blush.

In Part I of this article, I provide a brief overview of the long-standing debate over the relationship between Congress and the courts in crafting a jurisdictional regime. In Part II, I discuss textualists' claims about statutory interpretation, focusing on the faithful-agent account of the judicial role and on textualists' claims that their methodology better constrains judicial discretion. In Part III, I canvass the current jurisdictional regime, focusing on when (and how) judicial interpretations of jurisdictional statutes follow plain statutory text, and when (and how) they depart from it. Finally, in Part IV I address why the rise of textualism has not produced a markedly different judicial approach to construing expansive jurisdictional statutes, and what this state of affairs suggests more generally about both textualism and the broader debate about the relationship between Congress and the courts in crafting a jurisdictional regime. I conclude by arguing that the Court's selective application of textualism to limit federal-court jurisdiction

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<sup>23</sup> Cf. Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1475 (2007) (arguing that textualists accept various fictions about the legislative process in order to operationalize a theory of judicial restraint).

suggests that, at least as a descriptive matter, the strong congressional-control models fail fully to capture the law governing federal-court jurisdiction.

## I. CRAFTING A JURISDICTIONAL REGIME: CONGRESS AND THE COURTS

Academics have enthusiastically discussed the extent of Congress's authority to control the jurisdiction of the federal courts at least since Henry Hart's famous "Dialogue."<sup>24</sup> The debate has addressed both Congress's power to strip the federal courts—either lower federal courts, the Supreme Court in its appellate capacity, or both—of jurisdiction and the federal courts' authority to decline to exercise jurisdiction that Congress ostensibly has granted. The literature on these questions is voluminous; I provide a brief overview below.

### A. Congress's Authority to Deprive the Federal Courts of Jurisdiction

The issue of jurisdiction-stripping—that is, of Congress's power to divest the federal courts of jurisdiction over particular matters—actually embraces two separate, though related, questions: Congress's power over the jurisdiction of the lower federal courts, and Congress's power to limit the appellate jurisdiction of the Supreme Court. The traditional view is that Congress's power to limit the jurisdiction of the lower federal courts is plenary. Article III, after all, leaves to Congress the decision whether to create lower federal courts in the first instance.<sup>25</sup> The records of the Constitutional Convention make clear that this provision was the product of a compromise between those who thought that federal courts were necessary for the vindication of federal rights and those who thought that state courts were adequate for all claims.<sup>26</sup> The traditional argument is straightforward: If, as Paul Bator argued, Congress is free to decide that there should be no lower federal courts at all, then Congress must have authority to create them while limiting their jurisdiction.<sup>27</sup>

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<sup>24</sup> Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

<sup>25</sup> U.S. CONST., art. III, § 1 (vesting the "judicial Power" in "one Supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish."); see Gunther, *supra* note 4, at 912.

<sup>26</sup> See 1 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION 124-25 (1937); Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of the Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 52-56 (1975).

<sup>27</sup> Bator, *supra* note 4, at 1030-31.

The traditional view is thus based, at least in part, on the intuition that the greater power includes the lesser.<sup>28</sup> It also relies on an argument—grounded in constitutional text, history, and structure—that if the question of access to the lower federal courts “should be left [as] a matter of political and legislative judgment,” then it makes no sense to conclude that Congress’s only authority is the “all-or-nothing power to decide whether *none* or *all* of the cases to which the federal judicial power extends need the haven of a lower federal court.”<sup>29</sup> Proponents of the traditional view also point out that Congress, starting with the Judiciary Act of 1789, has consistently assumed that it has power to decide which controversies should be litigated in the first instance in the lower federal courts, and that the federal courts have generally endorsed this view.<sup>30</sup> Advocates of the traditional view do not deny that there may be some constitutional limits on Congress’s power to strip the lower federal courts of jurisdiction, but they generally have contended that those limits do not inhere in Article III but instead should be inferred from other constitutional provisions.<sup>31</sup>

Under the conventional view, Congress’s power to limit the Supreme Court’s appellate jurisdiction is similarly broad. The “Exceptions Clause” of Article III provides that in most categories of cases within the judicial power, the Supreme Court “shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”<sup>32</sup> Herbert Wechsler argued that this text compels the conclusion that “Congress has the power by enactment of a statute to strike at what it deems judicial excess by

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<sup>28</sup> See Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143, 145 (1982); *But see* Bator, *supra* note 4, at 1031 (disclaiming the greater-includes-the-lesser argument); Gunther, *supra* note 4, at 912 (same).

<sup>29</sup> Bator, *supra* note 4, at 1031; *accord* Gunther, *supra* note 4, at 912 (“It is certainly difficult to argue that lower federal courts must be available to adjudicate federal claims when the explicit language of Article III, and the central point of the Constitutional Convention’s compromise, was to leave the establishment of lower federal tribunals to the discretion of Congress.”). For a hyper-textualist defense of the traditional view, see Harrison, *supra* note 4, at 209-50.

<sup>30</sup> See Bator, *supra* note 4, at 1031-33; Gunther, *supra* note 4, at 913; *e.g.*, *Sheldon v. Sill*, 8 How. 441 (1850); *Palmore v. United States*, 411 U.S. 389, 401 (1973).

<sup>31</sup> Such “external” restraints—as opposed to “internal” restraints, which arguably are implied by Article III itself, *see* Gunther, *supra* note 4, at 900—would include a prohibition on federal laws limiting access to the lower federal courts on the basis of race. *See id.* at 916; Bator, *supra* note 4, at 1034. In addition, Martin Redish has argued that the Due Process Clause might require a federal forum in cases seeking judicial relief for the unlawful actions of federal officers, because the principle of *Tarble’s Case*, 80 U.S. (13 Wall.) 397 (1871), and related cases makes the state courts unavailable in many such actions. *See* Redish & Woods, *supra* note 26, at 49-52.

<sup>32</sup> U.S. CONST., art. III, § 2, cl. 2.

delimitations of . . . the Supreme Court’s appellate jurisdiction.”<sup>33</sup> Wechsler and other luminaries in the field of federal courts—including Paul Bator, Gerald Gunther, William Van Alstyne, and Martin Redish—have concluded, based on text,<sup>34</sup> history,<sup>35</sup> congressional practice,<sup>36</sup> and judicial precedent,<sup>37</sup> that Congress’s power under the Exceptions Clause is plenary. Advocates of the traditional view of Congress’s power to limit the Supreme Court’s appellate jurisdiction emphasize that although Congress’s power is broad, the power is subject to powerful political and practical limits, and that, generally speaking, Congress would be unwise to exercise the power.<sup>38</sup>

Under the traditional view, therefore, Congress has considerable—if not unlimited—power to deprive the lower federal courts of jurisdiction and to strip the Supreme Court of appellate jurisdiction. Although this view of Congress’s power to control federal-court jurisdiction has attracted very prominent adherents over the years, it has been unable to generate consensus. Henry Hart, for one, famously suggested that Congress lacked the power, under the Exceptions Clause, to “destroy the essential role of the Supreme Court in the constitutional plan.”<sup>39</sup> Leonard Ratner elaborated on Hart’s “essential functions” thesis, and argued that Congress cannot deprive the Supreme Court of the ability “to maintain the supremacy and uniformity of federal law.”<sup>40</sup>

Several other commentators have viewed the questions of congressional control over the jurisdiction of the Supreme Court and of the lower federal courts together, concluding that

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<sup>33</sup> Wechsler, *supra* note 4, at 1005.

<sup>34</sup> Bator, *supra* note 4, at 1038.

<sup>35</sup> Redish, *An Internal and External Examination*, *supra* note 4, at 908–11.

<sup>36</sup> Gunther, *supra* note 4, at 906–07.

<sup>37</sup> See William W. Van Alstyne, *A Critical Guide to Ex Part McCordle*, 15 ARIZ. L. REV. 229, 233–62 (1973); Gunther, *supra* note 4, at 904–05.

<sup>38</sup> See Wechsler, *supra* note 4, at 1006–07 (noting that “government cannot be run without the use of courts for the enforcement of coercive sanctions and within large areas it will be thought that federal tribunals are essential to administer federal law” and that a “jurisdictional withdrawal . . . might work to freeze the very doctrines that had prompted its enactment”); Bator, *supra* note 4, at 1041 (arguing that Congress should not enact laws stripping the Supreme Court of jurisdiction “not only because they represent bad policy but because they violate the structure and spirit of the instrument”); Gunther, *supra* note 4, at 909–12 (“Most of us would strongly prefer to have Congress express its disaffection with Court rulings by initiating constitutional amendments rather than by chopping off segments of the Court’s jurisdiction. Invocations of the “exceptions” power would be unseemly and chaotic and might ultimately damages relations between the Court and the political branches that have worked reasonably well in our nation’s history.”).

<sup>39</sup> Hart, *supra* note 24, at 1365.

<sup>40</sup> Leonard Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929, 957 (1982); Leonard Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960).

Congress cannot infringe upon some mandatory core of federal jurisdiction. Theodore Eisenberg, for example, argues that the Framers believed that there would be a federal forum for all cases within the federal judicial power. Further, because Supreme Court review of all cases within the federal judicial power is simply not feasible anymore, Eisenberg asserts that it would be inconsistent with the constitutional role of the federal judiciary for Congress to abolish the lower federal courts today.<sup>41</sup> Lawrence Sager asserts that the text, history, and logic of Article III require that there always be at least one Article III court available to review assertions of constitutional right,<sup>42</sup> and that Congress lacks power selectively to deprive the federal courts of jurisdiction to review constitutional claims.<sup>43</sup> Others have made similar claims based on original source materials, text, and structure.<sup>44</sup> Finally, in a recent article, James Pfander argues that although Congress's power to "constitute tribunals inferior to the supreme Court"<sup>45</sup> permits Congress to vest exclusive jurisdiction in state courts over federal claims, the express inferiority requirement forbids Congress from entirely divesting the Supreme Court of power to review the judgments of state courts invoking that jurisdiction.<sup>46</sup> These related theories of mandatory federal jurisdiction, in contrast to the traditional view, impose substantial limits on Congress's power to deprive the federal courts of jurisdiction. On these views, albeit to different degrees, Congress's power over the jurisdiction of the federal courts is largely allocative, rather than a license absolutely to curtail federal jurisdiction.

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<sup>41</sup> Eisenberg, *supra* note 5, at 504–13.

<sup>42</sup> Sager, *supra* note 5, at 66.

<sup>43</sup> *Id.* at 68–77. For a similar argument, see Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 141–46 (1981).

<sup>44</sup> Relying on original source materials, Robert Clinton agreed that Congress is required to allocate to the federal judiciary every type of case listed in Article III. Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984). Clinton argued that there may be an exception for trivial cases, over which Congress need not confer jurisdiction on the federal courts. *See id.* at 827–28, 839–40. Akhil Amar offered a variation on this theme, arguing that constitutional text, history, and structure demonstrate that the Framers believed that some federal court would be available “to hear and resolve finally any given federal question, admiralty, or public ambassador case,”<sup>44</sup> Amar, *supra* note 5, at 206, 229–30; *see also* Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990) (considering the Act as evidence of the Framers’ acceptance of the two-tiered view of federal jurisdiction), the heads of jurisdiction for which Article III provides that the judicial power “shall extend to *all* Cases,” U.S. CONST., art. III, § 2, cl. 1 (emphasis added). Steven Calabresi and Gary Lawson recently offered a theory of mandatory jurisdiction based on a similar reading of the text, and of other provisions of the Constitution. *See* Calabresi & Lawson, *supra* note 1.

<sup>45</sup> U.S. CONST., art. I, § 8, cl. 9.

<sup>46</sup> Pfander, *Federal Supremacy*, *supra* note 1; *see also* Calabresi & Lawson, *supra* note 1; Laurence Claus, *The One Court That Congress Cannot Take Away: Singularity, Supremacy, and Article III*, 96 GEO. L.J. 59 (2007).

At bottom, the debate over Congress's power to deprive the federal courts of jurisdiction is a question of the proper relationship between Congress and the federal courts. The more one is committed to the notion of legislative supremacy, the more one is likely to accept the traditional, congressional-control view. Below I consider what the rise of textualism suggests about popular commitments to this notion; but first I provide a brief overview of the related debate over the courts' authority to decline to exercise power that Congress has granted.

### *B. The Federal Courts' Authority to Decline to Exercise Power That Congress Has Affirmatively Granted*

A similar debate has raged over the extent of the federal courts' power to decline to exercise jurisdiction that Congress has ostensibly granted. This discourse reflects the same fundamental theme at issue in the controversy over Congress's power to deprive the federal courts of jurisdiction: the degree to which Congress exercises control over the jurisdiction of the federal courts.<sup>47</sup> Martin Redish is the principal proponent of a strong congressional-control model, arguing that "neither total nor partial judge-made abstention is acceptable as a matter of legal process and separation of powers."<sup>48</sup> Although Redish concedes that the federal courts "have long assumed the authority to decline to exercise jurisdiction explicitly vested in them by Congress,"<sup>49</sup> he argues that such actions amount to "blatant—and indefensible—usurpation[s] of legislative authority" that are inconsistent with democratic principles.<sup>50</sup> According to Redish's vision of the separation of powers, Congress creates jurisdiction, and the courts must exercise it consistent with Congress's commands.<sup>51</sup>

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<sup>47</sup> See generally RICHARD H. FALLON, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1234–35 (4<sup>th</sup> ed. 1996) (*hereinafter*, "HART AND WECHSLER'S").

<sup>48</sup> Redish, *Abstention*, *supra* note 6, at 74; accord MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER: JUDICIAL JURISDICTION AND AMERICAN POLITICAL THEORY 47-74 (1991).

<sup>49</sup> Redish, *Abstention*, *supra* note 6, at 71. Redish addresses both conventional abstention doctrines, *id.* at 75-80, and more informal forms of abstention, such as the judicially fashioned probate- and domestic-relations exceptions to the diversity jurisdiction, *id.* at 102–04. For a brief discussion of these doctrines, see *infra* at notes 270–290 and accompanying text.

<sup>50</sup> Redish, *Abstention*, *supra* note 6, at 72–74; accord Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 16 (1964) ("[J]urisdiction under our system is rooted in Article III and congressional enactments" and "is not a domain solely within the Court's keeping") (*hereinafter*, "Gunther, *Subtle Vices*").

<sup>51</sup> See, e.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution."); see also Gunther, *Subtle Vices*, *supra* note 50, at 12 (critiquing Alexander Bickel's reliance on the "passive virtues").

David Shapiro has responded by advancing a more robust role for the courts in crafting a jurisdictional regime.<sup>52</sup> He argues that, as a descriptive matter, judicial discretion in matters of jurisdiction “is much more pervasive than is generally realized.”<sup>53</sup> Indeed, such discretion, he argues, is “everywhere”<sup>54</sup> and does not amount to judicial usurpation, as Redish charged, but rather is “wholly consistent with the Anglo-American legal tradition.”<sup>55</sup> Shapiro’s normative defense goes beyond mere matters of tradition, though; he argues that judicial discretion in matters of jurisdiction actually strengthens the separation of powers, both horizontally (by helping to ease interbranch tensions)<sup>56</sup> and vertically (by reducing friction with state courts and state governments).<sup>57</sup> On this view, Congress does not lack authority to control the jurisdiction of the federal courts, but it must act clearly if it seeks to narrow the courts’ presumptive discretion in matters of jurisdiction.<sup>58</sup>

The debates over the extent of Congress’s control over the federal courts’ jurisdiction ultimately cannot be resolved without careful consideration of the appropriate judicial role in our constitutional system. Although there have been some attempts systematically to consider the courts’ institutional role vis-à-vis Congress in the jurisdictional context, scholars have generally told only part of that quite complicated story.<sup>59</sup> As I explore in more detail below, theories of

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<sup>52</sup> See Shapiro, *Jurisdiction and Discretion*, *supra* note 7.

<sup>53</sup> *Id.* at 545.

<sup>54</sup> Barry Friedman, *Seventy-Fifth Anniversary Retrospective: Most Influential Articles—David L. Shapiro*, *Jurisdiction and Discretion*, 75 N.Y.U. L. REV. 1553, 1553 (2000).

<sup>55</sup> Shapiro *Jurisdiction and Discretion*, *supra* note 7, at 545.

<sup>56</sup> *Id.* at 585-87; see also See Alexander Bickel, *The Supreme Court, 1960 Term – Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); Daniel J. Meltzer, *Jurisdiction and Discretion Revisited*, 79 NOTRE DAME L. REV. 1891, 1893 (2004) (*hereinafter*, “Meltzer, *Jurisdiction and Discretion Revisited*”); cf. Daniel J. Meltzer, *The Supreme Court’s Judicial Passivity*, 2002 SUP. CT. REV. 343, 396 (critiquing view that Congress can resolve up front all difficult questions likely to arise in litigation) (*hereinafter*, “Meltzer, *Judicial Passivity*”).

<sup>57</sup> Shapiro *Jurisdiction and Discretion*, *supra* note 7, at 580–85. Barry Friedman has advanced a variation on Shapiro’s position, arguing that boundaries of federal jurisdiction evolve—and properly evolve—“through a dialogic process of congressional enactment and judicial response.” Friedman, *A Different Dialogue* *supra* note 5, at 2.

<sup>58</sup> David L. Shapiro, *Reflections on the Allocation of Jurisdiction Between State and Federal Courts: A Response to “Reassessing the Allocation of Judicial Business Between State and Federal Courts,”* 78 VA. L. REV. 1839, 1845 (1992).

<sup>59</sup> See Mark Tushnet & Jennifer Jaff, *Why the Debate Over Congress’ Power to Restrict the Jurisdiction of the Federal Courts is Unending*, 72 GEO. L.J. 1311, 1312 (1984) (“[T]he positions that scholars take on the specific issue of congressional power to restrict jurisdiction frequently are bound up with the scholars’ more general views of the Constitution’s structure” and the nature of judicial review); Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445, 2448 (1998) (describing three “conflicting narrative” of the relationship between Congress and the courts that emerged from the jurisdiction- and remedy-stripping of the mid-1990s); cf. Evan Caminker, *Allocating the Judicial Power in a “Unified Judiciary,”* 78 TEX. L. REV. 1513, 1516 (2000) (arguing that the various attributes of judicial power fall into three “allocative categories,” and that Congress has varying power to allocate these attributes among



statutory interpretation are in large part about the relationship between Congress and the courts. To develop a richer account of Congress's authority over matters of federal court jurisdiction, therefore, it is a useful endeavor to consider the interpretive methodology that the courts use in construing statutes governing jurisdictional matters.

Both fronts in the battle over congressional control of federal jurisdiction, jurisdiction-stripping and judicial abstention, last raged in full force in the early- to mid-1980s, shortly before the ascendancy of textualism. Since then, the rise of textualism has redefined the debate about the courts' role in interpreting statutes. Yet the war about the appropriate judicial role in crafting a jurisdictional regime has been waged without attention to the changes that textualism has worked in the debate over the judicial role. In light of the textualist revolution, it is time to update the discussion of the respective roles of Congress and the courts in crafting a jurisdictional regime.

## II. TEXTUALISM AND THE JUDICIAL ROLE

For much of the twentieth century, the conventional approaches to statutory interpretation required a court to determine either what the legislature intended in enacting the relevant statute or what the animating purposes of that statute were. Because under the former approach, generally known as "intentionalism," legislative intent was the touchstone of statutory interpretation, judges generally considered any source that shed light on the legislature's intent.<sup>60</sup> Under the latter approach, generally known as "purposivism," and exemplified by the Hart and Sacks "legal process" school, courts read statutory language in light of the (often unarticulated) purposes that animated the statute.<sup>61</sup> Obviously, in pursuit of the goals of these inquiries,

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the federal courts); James S. Liebman & William F. Ryan, "Some Effectual Power": *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 884 (1998) (arguing that there are five qualities constituting the "judicial Power," and that they are the principal means for keeping federal law supreme over contrary state law in cases in which Congress confers jurisdiction); James E. Pfander, *Jurisdiction Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1435 (2000) (arguing that "the constitutional requirement of 'supremacy' may leave Congress free to fashion exceptions and regulations to the Court's as-of-right appellate jurisdiction, but limit its ability to couple such regulations with restrictions on the Court's supervisory role that would threaten the constitutional requirement of lower federal court 'inferiority' to the one 'supreme' court specified in Article III.")).

<sup>60</sup> See Eskridge, *New Textualism*, supra note 19, at 626-40.

<sup>61</sup> See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1374 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); see also T. Alexander

statutory language was important and often decisive for both intentionalists and purposivists,<sup>62</sup> but it was not the sole focus of the interpretive inquiry. Under either approach, it was possible in theory for some source, such as legislative history or apparent spirit or purpose, to trump the statutory text, and this occasionally occurred in practice.<sup>63</sup> Intentionalism and purposivism proceeded from the premise of legislative supremacy: If, in a constitutional democracy, judges must be faithful agents of Congress, then judges must attempt to decipher as accurately as possible Congress's statutory instructions.<sup>64</sup>

Textualism, in contrast, is an approach to statutory interpretation that accords dispositive weight to the meaning of the statutory text. It maintains that in interpreting statutes, courts must "seek and abide by the public meaning of the enacted text, understood in context."<sup>65</sup> The approach is thus closely identified with Oliver Wendell Holmes's famous claim that "[w]e do not inquire into what the legislature meant; we ask only what the statute means."<sup>66</sup> Justice Scalia, the leading modern proponent of textualism, has explained that the touchstone for the modern textualist's inquiry is "a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*."<sup>67</sup> Because the meaning of the text, rather than Congress's subjective intent in enacting the statute, is the proper focus, textualist judges generally refuse to treat legislative history as an authoritative

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Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 26–28 (1988) (associating legal process approach with intentionalist theories of statutory interpretation).

<sup>62</sup> See, e.g., *United States v. Am. Trucking Ass'n*, 310 U.S. 534, 542 (1940) ("In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress."); HART & SACKS, *supra* note 61, at 1374-80 (arguing that a court should "[i]nterpret the words of the statute . . . so as to carry out the purpose as best it can, making sure, however, that it does not give the words . . . a meaning they will not bear").

<sup>63</sup> See, e.g., *Ozawa v. United States*, 260 U.S. 178, 194 (1922) ("We may... look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail."); *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892); Eskridge, *New Textualism*, *supra* note 19, at 628 & n. 25 ("In a significant number of cases, the Court has pretty much admitted that it was displacing plain meaning with apparent legislative intent or purpose gleaned from legislative history"; collecting cases).

<sup>64</sup> See generally William N. Eskridge, Jr., & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 325–39 (1990).

<sup>65</sup> John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005) (hereinafter "Manning, *Legislative Intent*").

<sup>66</sup> Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899).

<sup>67</sup> Scalia, *supra* note 9, at 17.

indication of legislative intent.<sup>68</sup> For the same reason, textualists will not elevate the purposes or spirit of a statute over its text.<sup>69</sup>

Like intentionalism and purposivism, textualism is premised on the notion of legislative supremacy, and on the corollary that the courts must act, in a constitutional democracy, as the faithful agents of the legislature.<sup>70</sup> Textualists depart from intentionalists and purposivists, however, in their views of the legislative process, the notion of legislative intent, and the judiciary's relationship to Congress.<sup>71</sup> First, textualists have relied on the insights of public choice theory in arguing that because many statutes simply reflect bargains struck among interest groups competing for favorable treatment, departure from the statutory text threatens to disturb the legislative compromise.<sup>72</sup> Second, textualists draw on social choice theory<sup>73</sup> and legal realism<sup>74</sup> in arguing that the concept of a collective, unexpressed legislative intent is illusory. Together, these insights suggest that Congress has no single, identifiable intent, and that statutes have no single, identifiable purpose.<sup>75</sup> Third, textualists argue that the Constitution's institutional structure has implications for the judicial role in statutory interpretation. Only the text of statute, not its legislative history or underlying purposes, is enacted into law with the requisite participation by both Houses of Congress and the President. Accordingly, to elevate

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<sup>68</sup> See, e.g., John F. Manning, *Textualism as a Non-Delegation Doctrine*, 97 COLUM. L. REV. 673, 684-89 (1997) (hereinafter, "Manning, *Non-Delegation*").

<sup>69</sup> See, e.g., Scalia, *supra* note 9, at 23; Manning, *Legislative Intent*, *supra* note 65, at 420.

<sup>70</sup> See Scalia, *supra* note 9, at 17, 22; John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 15-21 (2001); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 371-72 (2005) (hereinafter "Nelson, *What is Textualism*").

<sup>71</sup> In focusing on textualism and intentionalism here, I do not mean to suggest that there are no other approaches to statutory interpretation. Instead, I discuss intentionalism to provide a richer account of textualism, which responded largely to intentionalist approaches. For other approaches to statutory interpretation, see, e.g., WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 116-18 (1994) (discussing doctrine of "the equity of the statute"); RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 267-87 (1985) (discussing "imaginative reconstruction" of statutes); GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 7 (1982) (arguing for a common-law function of courts to "see[] to it that the law is kept up to date").

<sup>72</sup> See Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 46 (1984); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) (hereinafter "Easterbrook, *Statutes' Domains*"); see generally William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975).

<sup>73</sup> See Easterbrook, *Text, History, and Structure*, *supra* note 9, at 68; Kenneth Shepsle, *Congress is a "They," not an "It"; Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992). For social choice theory, see KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 2-4 (2d ed. 1963).

<sup>74</sup> See William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT L. REV. 365, 372 (1990); Eskridge, *New Textualism*, *supra* note 19, at 642-43; Easterbrook, *Text, History, and Structure*, *supra* note 9, at 68. For the classic statement of the legal realists' view of legislative intent, see Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930).

<sup>75</sup> See Easterbrook, *Statutes' Domains*, *supra* note 72, at 536; Molot, *supra* note 10, at 25.

legislative history or unexpressed statutory purpose over statutory language ignores the constitutionally prescribed procedures for lawmaking and impermissibly aggrandizes the courts' role.<sup>76</sup> Textualists' refusal to treat legislative history as authoritative evidence of legislative intent<sup>77</sup> or to elevate the spirit of a law over its letter<sup>78</sup> flow naturally from these theoretical premises.<sup>79</sup>

Modern textualism arose in large part as a response to the perceived excesses of intentionalism and purposivism, and to the perceived activism of the Court in matters of statutory interpretation.<sup>80</sup> But textualism is not merely reactive; its proponents have offered a coherent approach with strong theoretical bases. Textualists have argued that only their approach is ultimately consistent with the notion of faithful agency, with legislative supremacy, and the rule of law itself. Justice Scalia, for example, has argued that “it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawmaker meant, rather than by what the lawgiver promulgated.”<sup>81</sup> On this view, reliance on sources other than statutory text is “tyrannical,” because it “is the *law* that governs, not the intent of the lawgiver.”<sup>82</sup>

But the core of textualism's normative appeal lies in its claims about the judicial role and the dangers of judicial law-making.<sup>83</sup> As Justice Scalia explained, “being bound by genuine but unexpressed legislative intent rather than the law is only the *theoretical* threat” of non-textualist approaches to statutory interpretation; the “*practical*,” and more immediate, threat is that “under

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<sup>76</sup> See, e.g., Scalia, *supra* note 9, at 17–18, 21–22; Manning, *Non-Delegation Doctrine*, *supra* note 68, at 695–99; Easterbrook, *Text, History, and Structure*, *supra* note 9, at 63.

<sup>77</sup> Scalia, *supra* note 9, at 29–36; Manning, *Non-Delegation Doctrine*, *supra* note 68 at 684–90.

<sup>78</sup> Scalia, *supra* note 9, at 17–23; Manning, *Legislative Intent*, *supra* note 65, at 420.

<sup>79</sup> See Scalia, *supra* note 9, at 17 (“Men may intend what they will; but it is only the laws that they enact which bind us.”).

<sup>80</sup> See John F. Manning, *What Divides Textualists and Purposivists?*, 106 COLUM. L. REV. 70, 76 (2006) (*hereinafter* “Manning, *Textualists and Purposivists*”) (“[T]extualism originated in reaction to the Court’s traditional (and perhaps anachronistic) understanding of purposivism.”); Caleb Nelson, *A Response to Professor Manning*, 91 VA. L. REV. 451, 455 (2005); Molot, *supra* note 10, at 25; Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1025–32 (1998). For arguments that theories of statutory interpretation are cyclical, see Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149 (2001); William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799 (1985); cf. Barry Friedman, *The Cycles of Constitutional Theory*, LAW & CONTEMP. PROBS., Summer 2004, at 149, 149 (“When the ideological valence of Supreme Court decisions shifts, constitutional theorizing about judicial review tends to shift as well.”).

<sup>81</sup> Scalia, *supra* note 9 at 17.

<sup>82</sup> *Id.*

<sup>83</sup> See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2388, 2435 (2003) (describing the “rule-of-law objectives implicit in the Constitution’s strict separation of lawmaking from judging.”).

the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field.”<sup>84</sup> In elevating statutory language over legislative history and statutory purposes by limiting the range of potentially ambiguous sources to which judges can properly refer, textualists hope to “constrain the tendency of judges to substitute their will for that of Congress.”<sup>85</sup> Moreover, it is not simply the limited range of permissible sources for discerning statutory meaning that constrains textualist judges; as Caleb Nelson recently argued, “textualism can be seen as a more rule-based method of ascertaining what the enacting legislature probably meant,”<sup>86</sup> harnessing the constraining power of rules while evading the discretion-conferring qualities of standards.<sup>87</sup>

Of course, there is a lively debate over whether textualism is more successful than other approaches to statutory interpretation at constraining judicial willfulness,<sup>88</sup> and over whether

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<sup>84</sup> Scalia, *supra* note 9, at 17–18; *see id.* at 18 (calling “legislative intent” a “handy cover for judicial intent”); *id.* at 21 (calling purposivism “an invitation to judicial lawmaking”).

<sup>85</sup> Eskridge, *New Textualism*, *supra* note 19, at 674; accord William N. Eskridge, Jr., *Textualism: The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1528–31 (1998) (*hereinafter* “Eskridge, *Unknown Ideal*”) (“According to the new textualists, consideration of legislative history creates greater opportunities for the exercise of judicial discretion.”); Easterbrook, *Statutes’ Domains*, *supra* note 72, at 551 (“[E]ven the best intentioned [judges] will find that the imagined dialogues of departed legislators have much in common with their own conceptions of the good.”); Molot, *supra* note 10, at 26; Antonin Scalia, *The Rule of Law as Law of Rules*, 56 U. CHI. L. REV. 1175, 1185 (1989) (“[W]hen one does not have a solid textual anchor . . . form which to derive the general rule, its pronouncement appears uncomfortably like legislation.”); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: And Empirical Analysis*, 70 TEX. L. REV. 1073, 1086–87 (1992) (“Textualists argue that the potentially wide array of originalist sources (especially legislative history) gives judges the freedom to justify (and hide) any policy decision.”); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1309–10 (1990) (“The Textualist fears that with this wealth of materials a court sift through the legislative history to reach results-oriented decisions.”).

<sup>86</sup> Nelson, *What Is Textualism*, *supra* note 70 at 377. Nelson relies on textualists’ rule-like stances with respect to legislative history, *id.* at 377, drafting errors, *id.* at 377–83, and canons of construction, *id.* at 383–98, and their willingness to embrace rule-like directives from Congress, *id.* at 398–403. *See also id.* at 98 (“[P]art of what drives textualists toward rules in the first place is their skepticism about judges’ abilities to apply an underlying justification consistently from case to case.”); Easterbrook, *Statutes’ Domains*, *supra* note 72, at 536 (“[U]nless . . . the community is willing to entrust almost boundless discretion to judges as oracles of the community’s standards[,] there is a need for some broader set of rules about when to engage in the open-ended process of construction.”).

<sup>87</sup> *See* Nelson, *What is Textualism*, *supra* note 70, at 374–75; *see generally* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 51–52 (1991); Kathleen Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953 (1995); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

<sup>88</sup> Molot, *supra* note 10, at 48–50 (“[A]s textualist scholars and judges begin to believe that textualist tools can be employed not just to resolve statutory ambiguity, but also to eliminate it, the opportunities for judicial creativity and abuse increase dramatically.”); Richard J. Pierce, Jr., *The Supreme Court’s New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative States*, 95 COLUM. L. REV. 749, 779–780 (1995) (suggesting that Court’s textualist approach might be influenced by the “ideological composition of the Executive and Judicial

textualism is more likely to effectuate the faithful agent theory of the judicial role in statutory interpretation.<sup>89</sup> Recent commentators, moreover, have argued that textualism and intentionalism in practice might not be as different as textualist critics maintain<sup>90</sup>—or at least that they might not be different for the reasons that textualists claim.<sup>91</sup> In any event, textualism has had an undeniably powerful impact on both legal scholarship and judicial decision-making.

Just ten years ago, Justice Scalia lamented that legal scholarship “has been seemingly agnostic as to whether there is even any such thing as good or bad rules of statutory interpretation,” and that there “are few law-school courses on the subject, and certainly no required ones.”<sup>92</sup> Today, in contrast, classes in statutory interpretation or legislation are commonplace at law schools, and many top programs have required first-year students to take a course that focuses on the positivization of law in the regulatory state.<sup>93</sup> The rise of textualism is in part responsible for these changes. To be sure, textualism remains somewhat unfashionable in academic circles—which, William Eskridge has noted, tend to be “a haven for the contextually

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Branches”); Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 38–39 (1998) (“[W]e might conclude that the failure to consult legislative history is actually the more activist move, for it gives the judge more power to shape the policy objectives of the statute unilaterally, unconstrained by policy priorities or goals that may have been expressed by legislators. Indeed, from the standpoint of judicial activism concerns, there is something perverse about a rule that would license judges to invoke policy considerations of their own making, secondary sources, and canons of construction, yet prohibit them from distilling and considering what relevant policy concerns may appear in the deliberative record generated by the legislators who drafted and debated the bill.”); Eskridge, *Unknown Ideal*, *supra* note 85, at 1522 (noting that the “debating history of federal statutes, most of which were enacted by Democratic Congresses,” is slanted “in a more regulatory-state direction,” and that textualism’s approach to legislative history might be a “politically conservative move by courts”); *cf.* Nelson, *What Is Textualism*, *supra* note 70, at 373 (“[T]oday’s textualists tend to be politically conservative, and the complex of attitudes that they draw upon in resolving close cases may well color what we think of as ‘textualism.’”); Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 819 (1994) (“[N]ew textualism effectively opens the door to seemingly unlimited judicial interpretive discretion every time an ambiguity is found to exist.”).

<sup>89</sup> Molot, *supra* note 10, at 53 (“[A]ggressive textualism tends to enhance the judiciary’s role vis-à-vis Congress. The creativity that aggressive textualism fosters in judges makes them look less like faithful agents of Congress and more like coequal partners.”); Schacter, *supra* note 88, at 39 (“[A] judicial decision to categorically disregard legislative history is, after all, a judicial decision about who decides what is relevant to statutory meaning, and is, in that sense, difficult to reconcile with a strong conception of judicial restraint.”); Redish & Chung, *supra* note 88, at 806 (“By generally confining an interpreting judge to text, new textualism leaves an interpreter without guidance in the numerous cases when the application of text to a specific fact situation is ambiguous or unclear.”).

<sup>90</sup> Molot, *supra* note 10, at 3–4. *But see* Manning, *Textualists and Purposivists*, *supra* note 80, at 91–109.

<sup>91</sup> Nelson, *What Is Textualism*, *supra* note 70, at 348–51. *But see* Manning, *Legislative Intent*, *supra* note 65, at 423–24.

<sup>92</sup> Scalia, COMMON-LAW COURTS, *supra* note 9, at 14–15.

<sup>93</sup> Harvard Law School, for example, now requires first-year students to take a course in Legislation and Regulation, <http://www.law.harvard.edu/admissions/jd/about/curriculum/> (last visited June 25, 2007), and Columbia offers a similar class as an elective to first-year students, [http://www.law.columbia.edu/jd\\_applicants/curriculum/11](http://www.law.columbia.edu/jd_applicants/curriculum/11) (last visited July 22, 2008). These courses typically provide a heavy dose of textualism, among other approaches.

inclined”<sup>94</sup>—and it is probably not the dominant approach to statutory interpretation among judges generally.<sup>95</sup> But there are indications that several—and perhaps even a majority of—Justices on the United States Supreme Court now consider themselves textualists.<sup>96</sup> More important, the ranks of textualists surely have grown since the theory’s emergence in the 1980s, and textualism has undoubtedly had a profound influence on both judicial decision-making and the on-going scholarly debate over the appropriate judicial role in statutory interpretation. Textualism has shaped the way in which even non-textualist Justices on the Supreme Court write their opinions, and very few judges and scholars today advance the strong purposivist approach to statutory interpretation that once dominated in the academy.<sup>97</sup> As Jon Molot has argued, textualism “seems to have been so successful . . . that [now] we are all textualists in an important sense.”<sup>98</sup>

In this article, I focus on the textualists’ two principal claims: (1) that their approach is most consistent with the faithful-agent conception of the judicial role in statutory interpretation; and (2) that their approach is more likely to constrain the capacity of judges to do mischief under the guise of statutory interpretation. In the sections that follow, I seek to test these claims by considering the manner in which textualists have interpreted jurisdictional statutes. I then draw upon both the descriptive and normative implications of the textualists’ treatment of jurisdictional statutes in order to update the long-standing debate about the extent of Congress’s authority to control the jurisdiction of the federal courts.

### III. THE CURRENT FEDERAL JURISDICTIONAL REGIME

If the congressional-control model of federal court jurisdiction were entirely accurate as a positive matter, then, in matters of federal jurisdiction, that Congress would legislate the proper boundaries of judicial cognizance and the courts would respond by faithfully following

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<sup>94</sup> Eskridge, *Unknown Ideal*, *supra* note 85, at 1513.

<sup>95</sup> Molot, *supra* note 10, at 29.

<sup>96</sup> See *supra* note 13.

<sup>97</sup> Non-textualist judges, for example, are considerably more likely today to cite dictionary meanings—a common tool of the trade for textualists, see Gregory C. Sisk, *The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making*, 93 *Cornell L. Rev.* 873, 893 (2008)—in the course of statutory interpretation. See, e.g., *Begay v. United States*, 128 S. Ct. 1581, 1586 (2008) (Breyer, J.).

<sup>98</sup> Molot, *supra* note 10, at 43; Siegel, *supra* note 80, at 1057.

Congress's mandates—regardless of whether Congress restricts or enlarges<sup>99</sup> the courts' jurisdiction. However, the actual law of federal jurisdiction is a confusing blend of statutes and judicial decisions, some of which purport to interpret statutes and others of which appear to be tantamount to common-law decisions. In some contexts, Congress has led and the courts have followed;<sup>100</sup> in others, the courts have led, and Congress has followed;<sup>101</sup> in still others, the courts have acted without any congressional involvement.<sup>102</sup> In many cases, although the jurisdictional statutes are brief and straightforward, court-made jurisdictional doctrine is complex and based upon something other than plain text.<sup>103</sup>

With the ascendancy of textualism, one might expect this pattern to change. As faithful agents of Congress, with the principal's instructions embodied in the plain text of its enactments, courts applying a textualist approach to jurisdictional questions presumably should treat the plain language of jurisdictional statutes as dispositive in deciding matters of federal jurisdiction. The normative force of the textualist critique, after all, derives from its assertion about the “uncomfortable relationship of common-law lawmaking to democracy,” a problem that is particularly acute in the statutory context.<sup>104</sup> Perhaps, therefore, we would expect a textualist judge to decline to find implicit exceptions to a statute that plainly provides, for example, that the district court “*shall have* original jurisdiction of *all* civil actions” arising under federal law.<sup>105</sup>

Yet this has not exactly been the case. Instead, the Court's textualist Justices have frequently interpreted jurisdictional statutes according to something other than the plain meaning of their statutory text. This is not to say that those Justices have *consistently* interpreted

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<sup>99</sup> Assuming, of course, no constitutional limits on Congress's power to do so. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (declaring unconstitutional provision of Judiciary Act of 1789 purporting to expand Supreme Court's original jurisdiction beyond that defined in Article III).

<sup>100</sup> For example, Congress statutorily established an amount-in-controversy requirement for diversity cases, and the courts have developed a complicated set of rules to implement the requirement.

<sup>101</sup> For interpretive problems that arise when Congress enacts statutory reforms that parallel judicial reinterpretations of existing laws, see Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Anti-Terrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1 (1997).

<sup>102</sup> See generally Shapiro, *Jurisdiction and Discretion*, *supra* note 7.

<sup>103</sup> Again, consider the aggregation rules that the courts have developed to determine whether the amount-in-controversy requirement is satisfied in a diversity case. See Friedenthal, Kane & Miller, *Civil Procedure* § 2.9 (4<sup>th</sup> ed. 2005).

<sup>104</sup> Scalia, *COMMON-LAW COURTS*, *supra* note 9, at 10; see *id.* at 17-18 (criticizing intentionalism because of the threat that “common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field”).

<sup>105</sup> 28 U.S.C. § 1331 (emphasis added).



jurisdictional statutes atextually; to the contrary, there are many recent cases in which the Court's textualists have appeared to apply a rigidly textualist approach to jurisdictional statutes. But in recent years the Court's textualist Justices have consistently tended to construe jurisdictional statutes in a textualist fashion only when the statutes *restrict*, rather than *expand*, federal-court jurisdiction.

In other words, the Court has continued, and perhaps accelerated, a project of narrowing the jurisdiction of the federal courts that it began about 35 years ago. The Court has carried out this project through its construction of jurisdictional statutes, and also by elaborating on doctrines, such as standing<sup>106</sup> or state sovereign immunity,<sup>107</sup> that are grounded in Article III or other constitutional provisions. As Judith Resnik has argued,<sup>108</sup> there also are explicit indications, wholly aside from the Court's formal decision-making, of the Court's desire in recent years to limit federal-court jurisdiction, such as the Judicial Conference's *Long Range Plan for the Federal Courts*<sup>109</sup> and the Chief Justice's annual report in 1997.<sup>110</sup> Contrary to the concern of many commentators in the early 1980s, "in both case law and commentary, the federal judiciary has recently warned Congress to be wary of *giving* jurisdiction to federal judges and has said nothing to signal concern about the prospect of *taking away* federal jurisdiction."<sup>111</sup>

Louise Weinberg has echoed this concern, arguing that the debate about congressional control over federal court jurisdiction ignores "the reality that it is the Supreme Court rather than Congress that is the more active agent in denials of access to courts."<sup>112</sup> Professor Weinberg suggests that the Court's move to limit federal court jurisdiction reflects hostility to plaintiffs,

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<sup>106</sup> See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Hein v. Freedom From Religion Foundation*, 127 S. Ct. 2553 (2007); cf. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1464–71 (2007) (Roberts, C.J., dissenting).

<sup>107</sup> See, e.g., *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44 (1996); *Idaho v. Coeur D'Alene Tribe of Idaho*, 521 U.S. 261 (1997).

<sup>108</sup> Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*, 86 GEO. L.J. 2589, 2626–27 (1998) ("In the 1990s . . . federal judges are more often than not commanding (doctrinally) and recommending (in their commentary) that their jurisdiction over federal rights be curtailed.").

<sup>109</sup> JUDICIAL CONFERENCE OF THE UNITED STATES, *LONG RANGE PLAN FOR THE FEDERAL COURTS* (as approved by the Judicial Conference, Dec. 1995), reprinted in 166 F.R.D. 49 (1995) (arguing for limits on federal jurisdiction, for no new "federalization of crime," and for the creation of fewer new causes of action).

<sup>110</sup> William H. Rehnquist, *The 1997 Year-End Report on the Federal Judiciary*, reprinted at 30 THIRD BRANCH, at 1 (Jan. 1998).

<sup>111</sup> Resnik, *supra* note 108, at 2622–23.

<sup>112</sup> Louise Weinberg, *The Article III Box: The Power of "Congress" to Attack the "Jurisdiction" of "Federal Courts"*, 78 TEX. L. REV. 1405, 1406–07 (2000).

litigation, and courts themselves, amounting to a form of “judicial self-loathing.”<sup>113</sup> One need not be as cynical as Professor Weinberg about the Court’s motivation to conclude that the unmistakable trend in recent years has been towards judicially self-imposed limits on federal jurisdiction.

The Court has pursued this project aggressively and notwithstanding the rise of textualism. This project and textualism are in harmony when Congress purports to oust the federal courts of jurisdiction or to impose express limits on the federal courts’ jurisdiction. But textualism’s focus on plain statutory text and the project to limit federal jurisdiction are in serious tension when Congress ostensibly—that is, on the face of its enactments— confers expansive jurisdiction. The sections that follow demonstrate that although the Court’s textualists have consistently applied a textualist approach to jurisdiction-ousting statutes, they have not done so when interpreting statutes that appear to grant jurisdiction without exception.<sup>114</sup> As I explain in Part IV, when faced with this conflict between the desire to be faithful agents and the desire to limit judicial authority, textualists have often<sup>115</sup> sacrificed the former in the name of advancing the latter.

In this Part, I survey the Court’s treatment of the many jurisdictional statutes that operationalize Article III’s grant of the judicial power to the federal courts. Because I am mindful of the perils of critiquing the decisions of a multi-member body,<sup>116</sup> and because it is important to understand the Justices’ individual approaches, I give as much attention to the expressed views of the Court’s self-professed textualists as I do to the Court’s actual decisions in cases in which the two differ. I have limited my discussion to the Court’s decisions since the rise of textualism, treating Justice Scalia’s appointment to the Court in 1986 as a rough proxy for the beginning of textualism’s rise in importance. Finally, by focusing on the views of the Court’s textualists, I do not mean to suggest that the Court’s non-textualist Justices have always

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<sup>113</sup> *Id.* at 1421.

<sup>114</sup> In Part IV, I argue that the best explanation for this selective application of textualism is that textualists have been more committed to textualism’s general project of limiting judicial authority than they have been to textualism’s insistence that judges act as faithful agents of Congress. In that Part, I also conclude that other explanations cannot fully account for why the rise of textualism has only selectively resulted in interpretations of jurisdictional statutes that can fairly be said to be based strictly on textual considerations—and that if they are forced to bear a heavy burden in explaining the selective application of textualism, then textualists’ claims about faithful agency are substantially undermined. See *infra*, Part IV.

<sup>115</sup> But not always. See *supra*, Part III.D.

<sup>116</sup> See generally Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982).

consistently applied their particular chosen approaches to statutory interpretation. I focus on the textualists because the textualists, unlike the non-textualists, have insisted that only their approach is theoretically coherent and consistent with the faithful-agent conception of the judicial role.

A. *An Illustrative Recent Case: Hamdan v. Rumsfeld*<sup>117</sup>

As an illustrative case, consider the Court's decision in *Hamdan v. Rumsfeld*, which demonstrates the textualists' approach selective approach to jurisdictional statutes. The threshold question in *Hamdan* was whether the Detainee Treatment Act of 2005 (DTA)<sup>118</sup> deprived the federal courts of jurisdiction to consider the petitioner's challenge to the system of military commissions established to adjudicate alleged offenses committed during hostilities in Afghanistan. Writing for the Court, Justice Stevens, relied on "ordinary principles of statutory construction" in holding that the statute did not deprive it of jurisdiction.<sup>119</sup> The Court noted that not "all jurisdiction-stripping provisions—or even all such provisions that truly lack retroactive effect—must apply to cases pending at the time of their enactment," because "normal rules of construction, including a contextual reading of statutory language, may dictate otherwise."<sup>120</sup>

In concluding that the statute did not deprive the federal courts of jurisdiction, the Court relied, among other things, on the statute's legislative history.<sup>121</sup> The Court chided Justice Scalia, who dissented on jurisdictional grounds, for facilely relying on the statute's "plain meaning" when Congress had declined expressly to provide that the relevant subsection of the statute applied to pending cases, even while making just such express provision for the other

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<sup>117</sup> 126 S. Ct. 2749 (2006).

<sup>118</sup> Pub. L. No. 109-148, 119 Stat. 2739. Section 1005(e)(1) provides: "No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba." Sections 1005(e)(2) and (3) vest exclusive jurisdiction in the United States Court of Appeals for the District of Columbia Circuit to review certain decisions. Section 1005(h)(1) provides that "[t]his section shall take effect on the date of the enactment of this Act," and 1005(h)(2) provides that "Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act."

<sup>119</sup> 126 S. Ct. at 2764.

<sup>120</sup> *Id.* at 2765. The Court noted that in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), and *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), it "recognized that statutes 'creating' jurisdiction may have retroactive effect if they affect 'substantive' rights," but argued that the Court had "applied the same analysis to statutes that have jurisdiction-stripping effect." *Id.* at 2768 n.12.

<sup>121</sup> 126 S. Ct. at 2766 n.10.

subsections of the same provision.<sup>122</sup> The Court rejected the government’s argument that the Court should abstain pursuant to the “judge-made rule that civilian courts should await the final outcome of on-going military proceedings before entertaining an attack on those proceedings.”<sup>123</sup> Relying on the congressional-control model of federal jurisdiction (at least with regard to abstention) the Court found no reason for federal courts to “depart from their general ‘duty to exercise the jurisdiction that is conferred upon them by Congress.’”<sup>124</sup>

Justice Scalia, the Court’s leading textualist, dissent joined by Justices Thomas and Alito.<sup>125</sup> He asserted that the DTA’s plain text unambiguously deprived the courts of jurisdiction to consider Hamdan’s habeas petition. According to Justice Scalia, an “ancient and unbroken line of authority attests that statutes ousting jurisdiction unambiguously apply to cases pending at their effective date,” and he argued that this “venerable rule” is not a “judge-made ‘presumption against jurisdiction.’”<sup>126</sup> Instead, he argued that it is a simple recognition of the reality that “the *plain import* of a statute repealing jurisdiction is to eliminate the power to consider and render judgment—in an already pending case no less than in a case yet to be filed.”<sup>127</sup> “To alter this plain meaning,” he insisted, “our cases have required an explicit reservation of pending cases in the jurisdiction-repealing statute.”<sup>128</sup> In Justice Scalia’s view, straightforward textualism required this conclusion: “[T]he cases granting such immediate effect are legion, and they repeatedly rely on the *plain language* of the jurisdictional repeal as an “inflexible trump” . . . by requiring an express reservation to save pending cases.”<sup>129</sup>

Justice Scalia then criticized the majority for relying on the legislative history of the DTA “to buttress its implausible reading,” because “[w]e have repeatedly held that such reliance is impermissible where, as here, the statutory language is unambiguous.”<sup>130</sup> In criticizing the Court’s reliance on legislative history, Justice Scalia advanced the classic textualist arguments for eschewing such reliance: Legislative history was not enacted “through the constitutionally

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<sup>122</sup> *Id.* at 2769.

<sup>123</sup> *Id.* at 2769.

<sup>124</sup> *Id.* at 2772 (quoting *Quackenbush v. Allstate Ins., Inc.*, 517 U.S. 706, 716 (1996)).

<sup>125</sup> Chief Justice Roberts did not participate.

<sup>126</sup> *Id.* at 2810 (Scalia, J., dissenting).

<sup>127</sup> *Id.* at 2810–11.

<sup>128</sup> *Id.* at 2811.

<sup>129</sup> *Id.* at 2812 (emphasis added); *see also id.* at 2812 (criticizing Court for “[d]isregarding the plain meaning of § 1005(e)(1)”).

<sup>130</sup> *Id.* at 2815–17.

prescribed method of putting language into a bill that a majority of both Houses vote for and the President signs”;<sup>131</sup> and “[a]s always—but *especially* in the context of strident, partisan legislative conflict of the sort that characterized enactment of this legislation—the language of the statute that was actually passed by both Houses of Congress and signed by the President is our only authoritative and only reliable guidepost.”<sup>132</sup>

If Justice Scalia’s view about the meaning of the DTA evinced quintessential textualism—and seeming obeisance to the strong congressional-control model for federal jurisdiction—his fall-back argument suggested quite the opposite. “Even if Congress had not clearly and constitutionally eliminated jurisdiction over this case,” he argued, “neither this Court nor the lower courts ought to exercise it.”<sup>133</sup> Hamdan asserted jurisdiction under the federal habeas statute, which provides that “[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.”<sup>134</sup> Justice Scalia insisted that “[t]raditionally, equitable principles govern both the exercise of habeas jurisdiction and the granting of the injunctive relief sought by petitioner,”<sup>135</sup> and he argued that, “[i]n light of Congress’s provision of an alternate avenue for petitioner’s claims . . . , those equitable principles counsel that we abstain from exercising jurisdiction in this case.”<sup>136</sup> Such abstention, Justice Scalia argued, was warranted because of concerns of “interbranch comity.”<sup>137</sup>

Justice Scalia’s approach is consistent with a pattern that has emerged since the ascendancy of textualism: The Court’s self-professed textualists advance strict, textually based interpretations of jurisdictional statutes that eliminate or limit federal court jurisdiction, to reach the conclusion that the federal courts lack jurisdiction over matters within the scope of those

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<sup>131</sup> See *id.* at 2816–17 (“[T]he handful of floor statements that the Court treats as authoritative do not ‘reflec[t] any general agreement.’ They reflect the now-common tactic—which the Court once again rewards—of pursuing through floor-speech *ipse dixit* what could not be achieved through the constitutionally prescribed method of putting language into a bill that a majority of both Houses vote for and the President signs.”).

<sup>132</sup> *Id.* at 2817; see also *id.* (“[D]rafting history is no more legitimate or reliable an indicator of the objective meaning of a statute than any other form of legislative history.”).

<sup>133</sup> 126 S. Ct. at 2819 (Scalia, J., dissenting).

<sup>134</sup> 28 U.S.C. § 2241(a).

<sup>135</sup> *Id.* at 2819–20; see also *id.* at 2821 n.9 (“The exercise of habeas jurisdiction has traditionally been entirely a matter of the court’s equitable discretion . . .”).

<sup>136</sup> *Id.* at 2820.

<sup>137</sup> *Id.* at 2822.

statutes;<sup>138</sup> at the same time they remain willing to offer wholly atextual interpretations of jurisdictional statutes that appear to grant more expansive jurisdiction, to reach the same conclusion. The following sections substantiate this pattern. I consider first the Court’s treatment of statutes that purport to deprive the courts of jurisdiction, or that purport to confer jurisdiction over only a limited class of cases. Then, I turn to the Court’s treatment of statutes that appear to confer expansive jurisdiction on the federal courts. In each section, I use illustrative cases to demonstrate the basic approach of the Court’s textualist Justices.

### *B. Textualist Interpretations of Statutes Limiting Lower Federal-Court Jurisdiction*

Justice Scalia’s approach in *Hamdan* is the rule, not the exception. This is true not only for the textualists’ approach to construing the federal habeas statute in cases involving detainees in the war on terror, or habeas cases more generally, but also for other statutes that ostensibly deprive the lower federal courts of jurisdiction, or at least affirmatively purport to exclude some cases from those courts’ jurisdiction. I address these categories of cases in turn.

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<sup>138</sup> This trend has been quite pronounced recently. Although the Court decided very few cases involving jurisdictional issues in the October 2007 term—the most important was *Boumediene v. Bush*, 128 S.Ct. 2229 (2008), but the question whether Congress had stripped the courts of jurisdiction was quite straightforward, and no member of the Court disagreed with the majority’s resolution of that question, *id.* at 2242–44—in the October 2006 term, the Court decided seven cases that involved claims that a lower federal court lacked jurisdiction to proceed. In five of the cases, the Court held that the lower federal court lacked jurisdiction, generally relying on the plain meaning of an ostensibly jurisdiction-limiting provision of the relevant jurisdictional statute. See *Rockwell Int’l Corp. v. United States*, 127 S. Ct. 1397 (2007) (Scalia, J.) (holding that district court lacked jurisdiction over relator’s claim in False Claims Act case because he was not “original source” within meaning of statute); *Burton v. Stewart*, 127 S. Ct. 793 (2007) (holding that district court lacked jurisdiction to entertain habeas petition because prisoner did not obtain authorization from the court of appeals to file a second or successive petition); *Bowles v. Russell*, 127 S. Ct. 2360 (2007) (holding that court of appeals lacked jurisdiction over appeal when district court extended time to appeal by more than 14 days permitted by 28 U.S.C. § 2107(c), because statutory time limits are jurisdictional in nature); *Powerex v. Reliant Energy Serv., Inc.*, 127 S. Ct. 2411 (2007) (holding that 28 U.S.C. § 1447(d) prohibited appellate review of subject-matter-jurisdiction-based remand); *Lawrence v. Florida*, 127 S. Ct. 1079 (2007) (holding that AEDPA’s statute of limitations for seeking federal habeas relief from a state-court judgment was not tolled during the pendency of a petition of for certiorari to the United States Supreme Court seeking review of the denial of state post-conviction relief). In four of those five decisions, some or all of the Court’s non-textualist Justices dissented. See *Powerex Corp.*, 127 S. Ct. at 2421 (Breyer, J., dissenting, joined by Stevens, J.); *Lawrence*, 127 S. Ct. at 1086 (Ginsburg, J., dissenting, joined by Stevens, Souter, and Breyer, JJ.); *Rockwell*, 127 S. Ct. at 1412 (Stevens, J., dissenting, joined by Ginsburg, J.); *Bowles*, 127 S. Ct. at 2367 (Souter, J., dissenting, joined by Stevens, Ginsburg, and Breyer, JJ.). And in one of the two cases in which the Court held that the lower court had jurisdiction, two of the Court’s textualists dissented. See *Osborn v. Haley*, 127 S. Ct. 881 (2007) (holding that a district court’s order remanding to state court a suit against a federal employee was reviewable notwithstanding section 1447(d), which limits the reviewability of remand orders); *id.* at 906–10 (Scalia, J., dissenting, joined by Thomas, J.) (arguing that section 1447(d)’s plain terms should have controlled).

In *Rasul v. Bush*,<sup>139</sup> the Court held that the federal habeas statute conferred jurisdiction to hear challenges by aliens held at Guantanamo Bay.<sup>140</sup> Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented. The dissent relied upon the proposition that “[f]ederal courts are courts of limited jurisdiction,” and that it “is to be presumed that a cause lies outside this limited jurisdiction.”<sup>141</sup> He chastised the Court for ignoring the “words of [28 U.S.C.] § 2241,” the habeas statute, which “presupposes a federal district court with territorial jurisdiction over the detainee.”<sup>142</sup>

Scalia also argued that “Congress is in session,” and that “[i]f it wished to change federal judges’ habeas jurisdiction from what this Court had previously held that to be, it could have done so.”<sup>143</sup> Chief Justice Rehnquist, joined by the Court’s other textualists, followed this approach in *Rumsfeld v. Padilla*,<sup>144</sup> in which he held for the Court that the district court in which the respondent filed his habeas petition lacked jurisdiction over the custodian because it was not the district of confinement. The Court relied on the “plain language of the habeas statute,”<sup>145</sup> and argued that “it is surely just as necessary in important cases as in unimportant ones that courts take care not to exceed their ‘respective jurisdictions’ established by Congress.”<sup>146</sup>

The textualists’ approach in *Hamdan*, *Rasul*, and *Padilla* cannot be explained simply by reference to the unusual status of the habeas petitioners in those cases. Instead, the textualists’ approach in those cases is consistent with their general approach to congressional limitations on the federal courts’ habeas corpus jurisdiction, which I will discuss in detail below.<sup>147</sup> First,

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<sup>139</sup> 542 U.S. 466 (2004).

<sup>140</sup> *Id.* at 483.

<sup>141</sup> *Id.* at 489 (Scalia, J., dissenting).

<sup>142</sup> *Id.* at 489; *see also id.* at 499–500 (arguing that the Court’s conclusion was “without a textual basis in the statute”). Justice Scalia’s opinion was addressed mostly to precedent, but he did note that neither party had challenged “the atextual extension of the habeas statute to United States citizens held beyond the territorial jurisdictions of the United States courts.” But he argued that “the possibility of one atextual exception thought to be required by the Constitution is no justification for abandoning the clear application of the text to a situation in which it raises no constitutional doubt.” *Id.* at 497.

<sup>143</sup> *Id.* at 506.

<sup>144</sup> 542 U.S. 426 (2004).

<sup>145</sup> *Id.* at 435, 443.

<sup>146</sup> *Id.* at 450–51.

<sup>147</sup> The Court has at times suggested that the concept of jurisdiction in the habeas statute is distinct from the more common notion of subject-matter jurisdiction. *See Padilla*, 542 U.S. at 434 n.7 (“using the term ‘jurisdiction’ ‘in the sense that it is used in the habeas statute, and not in the sense of subject-matter jurisdiction of the District Court.’”); *id.* at 451–54 (Kennedy, J., concurring) (stating that “the question of the proper location for a habeas petition is best understood as a question of personal jurisdiction or venue,” but declining to resolve the question); *id.* at 463 (Stevens, J., dissenting) (“[T]he question of the proper forum to determine the legality of Padilla’s

however, a very brief history is in order. In 1867, Congress granted the lower federal courts jurisdiction to review the claims of persons restrained under state law in violation of federal law.<sup>148</sup> Until the 1950s, the Court construed the statute to permit review only of the question whether the committing court had jurisdiction over the petitioner.<sup>149</sup> In the 1950s, however, the Court began to construe the statutory grant of jurisdiction expansively (and largely atextually).<sup>150</sup> Later, the Burger and Rehnquist Courts limited the reach of those decisions and erected other hurdles in the way of habeas petitioners. However, just like the Warren Court decisions to which these later Courts reacted, such developments almost always occurred through a common-law process with little basis in the text of the statute or demonstrable congressional intent.<sup>151</sup>

In 1996, Congress revised the statutory habeas regime when it enacted the Anti-Terrorism and Effective Death Penalty Act (AEDPA),<sup>152</sup> which imposed limits—some incorporating existing judicial precedent, and others created by Congress—on the federal courts’ authority to entertain and grant habeas petitions.<sup>153</sup> Unlike the Court’s pre-AEDPA decisions, which often made little effort to ground habeas doctrine in the language of the habeas statute, recent decisions construing AEDPA, particularly and perhaps unsurprisingly in opinions by the Court’s textualists, have relied more heavily on statutory language.<sup>154</sup> In *Tyler v. Cain*,<sup>155</sup> for example, Justice Thomas, speaking for the Court, narrowly interpreted 28 U.S.C. § 2244(b)(2)(A), which creates an exception to AEDPA’s limitations on habeas jurisdiction for new constitutional rules that the Supreme Court has “made retroactive to cases on collateral review.”<sup>156</sup> Justice Thomas insisted that the word “made” is synonymous with “held,” and that

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incarceration is not one of federal subject-matter jurisdiction.”)). But the Court has long held that the federal courts may exercise jurisdiction in habeas cases only to the extent that it is granted by Congress, *see* *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807) (Marshall, C.J.); HART & WECHSLER’S, *supra* note 47, at 1286–87, and in so doing have treated the habeas statutes in the jurisdictional sense relevant to this project.

<sup>148</sup> Act of February 5, 1867, 14 Stat. 385.

<sup>149</sup> *See, e.g.*, Paul Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 465–99 (1963); Friedman, *A Different Dialogue*, *supra* note 5, at 11.

<sup>150</sup> *See, e.g.*, *Brown v. Allen*, 344 U.S. 554 (1953); Friedman, *A Different Dialogue*, *supra* note 5, at 11; Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 277 (1988).

<sup>151</sup> *See, e.g.*, *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Teague v. Lane*, 489 U.S. 288 (1989); *Stone v. Powell*, 428 U.S. 465 (1976).

<sup>152</sup> 110 Stat. 1214 (1996).

<sup>153</sup> *See generally* HART & WECHSLER’S, *supra* note 47, at 1288–89.

<sup>154</sup> This is in part, of course, because Congress previously had offered little in the way of detailed statutory guidance.

<sup>155</sup> 533 U.S. 656 (2001).

<sup>156</sup> 28 U.S.C. § 2244(b)(2)(A).



the textual standard is not satisfied by the Court’s merely establishing principles of retroactivity to be applied by the lower courts.<sup>157</sup> Justice Breyer’s dissent, in contrast, invoked the statute’s purpose, which, he argued, did not “favor[], let alone require[], the majority’s conclusion.”<sup>158</sup> Similarly, in *Williams v. Taylor*,<sup>159</sup> the textualist-leaning Justices relied on dictionary definitions to justify a more narrow interpretation than that advanced by the dissenters of 28 U.S.C. § 2254(d)(1), which limits the grounds upon which habeas may be granted.<sup>160</sup> In *Lawrence v. Florida*,<sup>161</sup> the textualist-leaning Justices relied on what “the text of the statute,” “[r]ead naturally,” “must mean”<sup>162</sup> in concluding that AEDPA’s one-year statute of limitations for seeking federal habeas relief from a state-court judgment<sup>163</sup> was not tolled during the pendency of a petition for certiorari to the United States Supreme Court seeking review of the denial of state post-conviction relief.<sup>164</sup> In construing AEDPA in this fashion, the Court’s textualist-leaning Justices have made explicit their view that Congress controls the jurisdiction of the federal courts, at least with respect to jurisdiction-ousting statutes.<sup>165</sup>

The Court’s textualists have not always prevailed in cases interpreting AEDPA, but when in dissent they—particularly Justices Scalia and Thomas—have consistently advanced arguments, based on statutory text, that the Court lacks jurisdiction to grant relief. In *Stewart v. Martinez-Villareal*,<sup>166</sup> for example, the Court held that a prisoner’s competency-to-be-executed claim, which had been presented in a habeas application but had not been resolved because it

<sup>157</sup> 533 U.S. at 662-64, 665-68. Chief Justice Rehnquist and Justices O’Connor, Scalia, and Kennedy joined Justice Thomas’s opinion.

<sup>158</sup> *Id.* at 676.

<sup>159</sup> 529 U.S. 362, 405 (2000) (O’Connor, J.).

<sup>160</sup> 28 U.S.C. § 2254(d)(1) (providing that a writ of habeas corpus should not be granted unless adjudication of the merits of the claim in state court “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”); *see* 529 U.S. at 405 (O’Connor, J.) (praising court of appeals’ decision for “accurately reflect[ing] this textual meaning). Although Justice Scalia joined Justice O’Connor’s opinion for the Court on this question, he declined to join a footnote to her opinion that relied on the statute’s legislative history. *See id.* at 366.

<sup>161</sup> 127 S. Ct. 1079 (2007).

<sup>162</sup> *Id.* at 1083.

<sup>163</sup> 28 U.S.C. § 2422(d) creates a one-year statute of limitations for seeking federal habeas corpus relief from a state-court judgment, but provides that “[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.”

<sup>164</sup> 127 S. Ct. at 1086.

<sup>165</sup> *See Bowles v. Russell*, 127 S. Ct. 2360, 2366 (2007) (Thomas, J.) (concluding that the court of appeals lacked jurisdiction over a state prisoner’s federal habeas petition); *id.* at 2365 (“Within Constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider. Because Congress decides whether the federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them.”).

<sup>166</sup> 523 U.S. 637 (1998).

was not yet ripe, did not render a subsequent habeas application raising that claim a “second or successive application” within the meaning of 28 U.S.C. § 2244.<sup>167</sup> Justices Scalia and Thomas each dissented. Justice Scalia relied on the “unmistakable language” of the statute to conclude that Congress had deprived the courts of the jurisdiction that they had exercised before the enactment of AEDPA.<sup>168</sup> Justice Thomas “beg[an] with the plain language of the statute,”<sup>169</sup> relied on dictionary definitions of statutory terms,<sup>170</sup> and scolded the Court for letting its view of what would be perverse “override the statute’s plain meaning.”<sup>171</sup> In his dissent in *Hohn v. United States*,<sup>172</sup> Justice Scalia (joined by Rehnquist, O’Connor, and Thomas) advanced a similar argument. Their opinions in these cases rely quite explicitly on strong congressional-control models of federal jurisdiction.<sup>173</sup>

In *Immigration and Naturalization Service v. St. Cyr*,<sup>174</sup> the Court held that AEDPA and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)<sup>175</sup> did not deprive the federal courts of jurisdiction to review an alien’s habeas petition.<sup>176</sup> The majority relied heavily on canons of construction—including the doctrine of constitutional doubt—which it deployed to require clear statements of congressional intent before effectively suspending the writ of habeas corpus.<sup>177</sup> In dissent, Justice Scalia (joined by Chief Justice Rehnquist and Justice Thomas, and Justice O’Connor in part) criticized the Court for finding “ambiguity in the utterly clear language of a statute that forbids the district court (and all other courts) to entertain the

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<sup>167</sup> *Id.* at 641–45.

<sup>168</sup> *Id.* at 646 (Scalia, J., dissenting) (“It is impossible to conceive of language that more clearly precludes respondent’s renewed competency-to-be-executed claim than the written law before us here . . . The Court today flouts the unmistakable language of the statute to avoid what it calls a ‘perverse’ result. There is nothing ‘perverse’ about the result that the statute commands, except that it contradicts pre-existing judge-made law, which it was precisely the purpose of the statute to change.”); *id.* at 648 (“As hard as it may be for this Court to swallow, in [its] enactment of AEDPA Congress curbed our prodigality with the Great Writ.”).

<sup>169</sup> *Id.* at 648 (Thomas, J., dissenting).

<sup>170</sup> *Id.* at 649.

<sup>171</sup> *Id.* at 652–53; *accord id.* (“A statute that has the effect of precluding adjudication of a claim that for most of our Nation’s history would have been considered noncognizable on habeas can hardly be described as ‘perverse.’”).

<sup>172</sup> 524 U.S. 236 (1998). In *Hohn*, the Court held that it had jurisdiction to review a denial of an application for a certificate of appealability under 28 U.S.C. § 2253(c)(1). Justice Scalia lamented that the Court’s view was “contrary to the plain import of the statute,” the “whole point” of which was “to keep petitioner’s case against respondent out of the Court of Appeals unless petitioner obtains a COA.” *Id.* at 257 (Scalia, J., dissenting).

<sup>173</sup> See, e.g., *Stewart*, 523 U.S. at 647 (“Congress did not even have to create inferior courts, let alone invest them with plenary habeas jurisdiction over state convictions.”) (Scalia, J., dissenting) (citations omitted).

<sup>174</sup> 533 U.S. 289 (2001).

<sup>175</sup> 110 Stat. 3009-546 (1996).

<sup>176</sup> 533 U.S. at 314.

<sup>177</sup> 533 U.S. at 299-301.

claims of aliens . . . found deportable by reason of their criminal acts.”<sup>178</sup> He complained that “[i]t has happened before—too frequently, alas—that courts have distorted plain statutory text in order to produce a ‘more sensible’ result,” and he charged that the Court’s opinion did “violence . . . to the statutory text.”<sup>179</sup> Finally, he belittled the Court’s reliance on the doctrine of constitutional doubt by arguing that it is “a device for interpreting what the statute says—not for ignoring what the statute says in order to avoid the trouble of determining whether what it says is unconstitutional.”<sup>180</sup> To Justice Scalia, the statute was “crystal clear,”<sup>181</sup> and that was largely the end of the matter.<sup>182</sup>

Yet another example of the textualists’ consistency in their approach to jurisdiction-ousting statutes is *Lindh v. Murphy*.<sup>183</sup> The Court held that certain provisions of AEDPA did not apply to non-capital cases pending at the time of the statute’s enactment.<sup>184</sup> Chief Justice Rehnquist (joined by Justices Scalia, Kennedy, and Thomas) dissented. He acknowledged that the Court had previously, in *Hughes Aircraft Co. v. United States ex rel. Schumer*,<sup>185</sup> “rejected a presumption favoring retroactivity for jurisdiction-creating statutes,” but argued that nothing in prior cases “disparaged our longstanding practice of applying jurisdiction-ousting statutes to pending cases.”<sup>186</sup> In other words, the Court’s textualist Justices—all of whom had joined the opinion in *Hughes*—self-consciously applied different default rules to jurisdiction-creating and jurisdiction-ousting statutes, maximizing the chances that the Court would decline to exercise jurisdiction in any given case.

To be sure, the textualist Justices did join the opinion in *Felker v. Turpin*,<sup>187</sup> which avoided resolving any Suspension or Exceptions Clause issues by noting that Congress had not purported in AEDPA to strip the Supreme Court of its “original” jurisdiction to grant habeas

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<sup>178</sup> *Id.* at 326-27 (Scalia, J., dissenting).

<sup>179</sup> *Id.* at 335.

<sup>180</sup> *Id.* at 336.

<sup>181</sup> *Id.*

<sup>182</sup> Others have argued that the statute in fact clearly supported the majority’s view, at least for the question at issue. See Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1450 (2005).

<sup>183</sup> 521 U.S. 320 (1997).

<sup>184</sup> *Id.* at 323.

<sup>185</sup> 520 U.S. 939 (1997).

<sup>186</sup> *Id.* at 342, n.2 (Rehnquist, C.J., dissenting) (emphasis added).

<sup>187</sup> 518 U.S. 651 (1996).

petitions.<sup>188</sup> But the Court has rarely exercised that jurisdiction. More important for present purposes, *Felker* itself *upheld* a statute that substantially *narrowed* federal court jurisdiction in habeas cases, and in this respect the decision is consistent with the textualist Justices' more general pattern of construing strictly only those jurisdictional statutes that limit, rather than expand, federal court jurisdiction.<sup>189</sup>

Of course, it is possible that the textualists' approach to AEDPA reflects judicial hostility to habeas claims by persons convicted of crimes, or perhaps sympathy for claims of judicial federalism, more than it demonstrates anything particular about federal-court jurisdiction in general.<sup>190</sup> Any such argument is at best incomplete, however, because the textualists' approach to AEDPA is consistent with their approach to other statutes that purport to limit the jurisdiction of the federal courts.

There are a litany of examples. In *Woodford v. Ngo*,<sup>191</sup> for example, the Court's textualists interpreted the exhaustion provision in the Prison Litigation Reform Act<sup>192</sup> to preclude suits in which the prisoner filed an untimely or otherwise procedurally defective state administrative grievance or appeal.<sup>193</sup> In *Reno v. American-Arab Anti-Discrimination Committee*,<sup>194</sup> the Court held that the IIRIRA deprived the federal courts of jurisdiction over a suit raising a selective-enforcement claim against INS. Justice Scalia's majority, joined by Chief Justice Rehnquist and Justices Thomas, Kennedy, and O'Connor, advanced a "narrow reading" of the relevant provision of the statute,<sup>195</sup> and chastised Justice Souter's contrary reading for departing from the plain import of the statute's language.<sup>196</sup>

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<sup>188</sup> *Id.* at 659-61; see Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549 (2000).

<sup>189</sup> See Resnik, *supra* note 108, at 2623-27; Jackson, *supra* note 60, at 2451-52; Tushnet & Yackle, *supra* note 101, at 22-25.

<sup>190</sup> See *infra* notes 344-361 and accompanying text.

<sup>191</sup> 126 S. Ct. 2378 (2006).

<sup>192</sup> 42 U.S.C. § 1997e.

<sup>193</sup> Justice Alito wrote the opinion, and he was joined by Chief Justice Roberts and Justices Scalia, Thomas, Kennedy, and Breyer. The Court relied heavily on the meaning of the statute's term "exhausted." *Id.* at 2387.

<sup>194</sup> 525 U.S. 471 (1999).

<sup>195</sup> 525 U.S. at 487.

<sup>196</sup> See *id.* at 485, n.9 ("[A]ny challenge to imagination posed by reading s 1252(g) as written would be a small price to pay for escaping the overwhelming difficulties of Justice Souter's theory. . . . We do not think our interpretation 'parses s 1252(g) too finely,' but if it did, we would think that modest fault preferable to the exercise of such a novel power of nullification."). The Court also concluded that the doctrine of constitutional doubt did not require a different result. *Id.* at 487-92.

The pattern does not simply for statutes limiting jurisdiction over claims by disfavored litigants. The textualists also dissented, in *Hibbs v. Winn*,<sup>197</sup> from the Court's conclusion that the Tax Injunction Act<sup>198</sup> does not bar an action raising an Establishment Clause challenge to a state's tax program for allocating revenue to private schools. In reaching that conclusion, the majority relied in part on legislative history and statutory purpose.<sup>199</sup> Justice Kennedy (joined by Chief Justice Rehnquist and Justices Scalia and Thomas) argued, in dissent, that the Court's interpretation of the statute "contrasts with a literal reading of its terms," and that "[i]n the end the scope and purpose of the Act should be understood from its terms alone."<sup>200</sup> Kennedy relied on dictionary definitions of statutory terms, and criticized the Court's reliance on the statute's legislative history and purposes, at least with respect to a statute that contains "a plain congressional declaration" on the matter in question.<sup>201</sup> Justice Kennedy also expressly invoked the congressional-control model of federal jurisdiction in support of his view.<sup>202</sup> Similarly, Justice Scalia dissented in *Webster v. Doe*.<sup>203</sup> There, the Court held that a discharged CIA employee's constitutional claims were judicially reviewable notwithstanding a provision of the National Security Act of 1947<sup>204</sup> that, when viewed in light of the Administrative Procedure Act,<sup>205</sup> arguably divested the federal courts of the power to review such termination decisions. Justice Scalia relied on what he viewed as the straightforward reading of the relevant statutory provisions,<sup>206</sup> and made clear that he accepts the congressional-control model of federal jurisdiction, at least with respect to jurisdiction-stripping statutes.<sup>207</sup>

The textualists have advanced this view of statutes authorizing jurisdiction over limited classes of more mundane claims, as well. In *Finley v. United States*,<sup>208</sup> Justice Scalia wrote for a

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<sup>197</sup> 542 U.S. 88 (2004).

<sup>198</sup> 28 U.S.C. § 1341.

<sup>199</sup> See *id.* at 104-07.

<sup>200</sup> *Id.* at 113-114 (Kennedy, J., dissenting).

<sup>201</sup> See *id.* at 117-18, 122-26; accord *id.* at 126 ("In effecting congressional intent we should give full force to simple and broad proscriptions in the statutory language.").

<sup>202</sup> *Id.* at 126-27 (Kennedy, J., dissenting) ("[W]e are not obliged to maintain the status quo when the status quo is unfounded," because "the exercise of federal jurisdiction does not and cannot establish jurisdiction."). Justice Stevens responded separately to that contention. See *id.* at 113 (Stevens, J., concurring) ("In a contest between the dictionary and the doctrine of *stare decisis*, the latter clearly wins.").

<sup>203</sup> 486 U.S. 592 (1988).

<sup>204</sup> 50 U.S.C. § 403(c).

<sup>205</sup> 5 U.S.C. § 701.

<sup>206</sup> See *id.* at 615-19.

<sup>207</sup> See *id.* at 611-12.

<sup>208</sup> 490 U.S. 545 (1989).

bare majority, holding that the Federal Tort Claims Act (FTCA)<sup>209</sup> did not permit exercise of pendent-party jurisdiction over claims against parties as to which no independent basis for federal subject matter jurisdiction existed.<sup>210</sup> Justice Scalia began by noting the “rudimentary law” that in order for there to be federal jurisdiction, “an act of Congress must have supplied it.”<sup>211</sup> He then acknowledged that the Court had not always carefully adhered to this rule in cases involving pendent and ancillary jurisdiction,<sup>212</sup> but he stated that “with respect to the addition of parties, as opposed to the addition of only claims, we will not assume that the full constitutional power has been congressionally authorized, and will not read jurisdictional statutes broadly.”<sup>213</sup> Reading the text of the FTCA narrowly, Justice Scalia noted that § 1346(b) was not “formulat[ed as] one might expect if the presence of a claim against the United States constituted merely a minimum jurisdictional requirement, rather than a definition of the permissible scope of FTCA actions.”<sup>214</sup> The Court accordingly concluded that “‘against the United States’ means against the United States and no one else,” and that the lower court lacked jurisdiction over the plaintiff’s claims against parties other than the United States.<sup>215</sup>

Likewise, the Court’s textualists have taken the Court to task for failing to observe the limits that they have found in the plain terms of the removal statute. In *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*,<sup>216</sup> the Court held that a defendant must be officially summoned to

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<sup>209</sup> 28 U.S.C. § 1346(b).

<sup>210</sup> 490 U.S. at 555-56. *Finley* was statutorily overruled by 28 U.S.C. § 1367.

<sup>211</sup> *Id.* at 548 (quoting *The Mayor v. Cooper*, 6 Wall. 247, 252 (1868)).

<sup>212</sup> 490 U.S. at 548 (noting that in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), and its progeny, the Court had held, “without specific examination of jurisdictional statutes, that federal courts have “pendent” claim jurisdiction—that is, jurisdiction over nonfederal claims between parties litigating other matters properly before the court-to the full extent permitted by the Constitution”).

<sup>213</sup> *Id.* at 549.

<sup>214</sup> *Id.* at 552.

<sup>215</sup> *Id.* Justice Scalia relied for this strict approach to reading jurisdictional statutes on federalism concerns, *see id.* at 552-53 (“Due regard for the rightful independence of state governments requires that federal courts scrupulously confine their own jurisdiction to the precise limits which the statute has defined.” (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)), and on the need to ensure that Congress be able to legislate against a background of clear interpretive rules,” *id.* at 556. For a critique of Justice Scalia’s approach in *Finley*, *see* Meltzer, *Judicial Passivity*, *supra* note 56, at 400 (arguing that *Finley* (and the subsequent drafting of the supplemental jurisdiction) statute “illustrate[] how unlikely it is that a conception of the judicial role that throws everything in the lap of statutory drafters will work well in practice.”); *see also id.* at 403 (“How much better off we would have been had *Finley* never aspired to place responsibility for fine-tuning the contours of supplemental jurisdiction on the Congress and had Congress not therefore felt obliged to enact a comprehensive codification that proved to be full of pitfalls.”).

<sup>216</sup> 526 U.S. 344 (1999).

appear in an action before the time to remove under 28 U.S.C. § 1446(b) begins to run.<sup>217</sup> The Court relied in part on the legislative history of the statute and its revisions in reaching its conclusion and in rejecting the court of appeals' reliance on the "plain meaning" of the statute.<sup>218</sup> In dissent, Chief Justice Rehnquist (joined by Justices Scalia and Thomas) urged reliance on the "plain language" of section 1446(b), chastising the Court for "superimpos[ing] a judicially created service of process requirement onto § 1446(b)."<sup>219</sup> The dissenters argued that the Court's approach departed "from this Court's practice of strictly construing removal and similar jurisdictional statutes,"<sup>220</sup> an approach that would have limited the ability of litigants to invoke federal jurisdiction via removal.

Justice Scalia offered a similar view, this time for the Court, in *Powerex Corp. v. Reliant Energy Serv., Inc.*<sup>221</sup> There, he concluded that 28 U.S.C. § 1447(d)'s prohibition on appellate review of subject-matter-jurisdiction-based remands<sup>222</sup> does not require an absence of jurisdiction at the time of removal. He reached this conclusion based on the "standard principle of statutory construction [that] provides that identical words and phrases within the same statute should normally be given the same meaning,"<sup>223</sup> and he rejected the petitioner's contention because it had "no textual support."<sup>224</sup> Justice Scalia made clear that textualist principles of statutory interpretation drove the decision: "We will not ignore a clear jurisdictional statute in reliance upon supposition of what Congress really wanted," because "[a]s far as the Third Branch is concerned, what the text of § 1447(d) indisputably does prevails over what it ought to have done."<sup>225</sup>

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<sup>217</sup> Id. at 356. Section 1446 provides that a removal notice "shall be filed within thirty days after the receipt by the defendant, *through service or otherwise*, of a copy of the [complaint]." 28 U.S.C. § 1446.

<sup>218</sup> 526 U.S. at 351–53.

<sup>219</sup> Id. at 357 (Rehnquist, C.J., dissenting).

<sup>220</sup> See id. at 357 (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941)).

<sup>221</sup> 127 S. Ct. 2411 (2007).

<sup>222</sup> 28 U.S.C. § 1447(d) provides in relevant part: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."

<sup>223</sup> Id. at 2417.

<sup>224</sup> Id. at 2419.

<sup>225</sup> Id. at 2420. Justices Scalia and Thomas advanced a similarly narrow interpretation of the removal statute's appellate review provisions in *Osborn v. Haley*, 127 S. Ct. 881 (2007), in which, the Court held that a district court's order remanding to state court a suit against a federal employee was reviewable notwithstanding 28 U.S.C. § 1447(d), which limits the reviewability of remand orders. Id. at 895-96. Section 1447(d) provides: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . ." 28 U.S.C. § 1447(d). Justice Scalia, joined by Justice Thomas, dissented, arguing that section 1447(d)'s plain terms should have controlled. He complained that "[f]ew statutes read more clearly" than section 1447(d), and that the

Finally, the textualists have generally refused to find federal jurisdiction without an explicit grant of statutory authority: In *Kokkonen v. Guardian Life Ins. Co. of America*,<sup>226</sup> the Court, in an opinion by Justice Scalia, held that the district court lacked inherent power to enforce the terms of a settlement agreement under the doctrine of ancillary jurisdiction, where the agreement was not part of the order of dismissal and there was no independent basis for federal subject-matter jurisdiction.<sup>227</sup> Justice Scalia explained that “[f]ederal courts are courts of limited jurisdiction,” and that “[t]hey possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree.” Accordingly, it “is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.”<sup>228</sup> The textualists have also advanced this position by granting a motion to dismiss a dispensable non-diverse party,<sup>229</sup> and by regularly joining opinions expressing reluctance to find appellate jurisdiction under the judicially created collateral-order doctrine.<sup>230</sup>

Textualists, in other words, have consistently relied on the plain meaning of jurisdiction-ousting or jurisdiction-limiting statutes to find that the federal courts have been deprived of jurisdiction. In offering such interpretations of jurisdictional statutes, the Court’s textualists have often relied explicitly on a strong congressional-control model of federal jurisdiction, insisting that the federal courts cannot exercise jurisdiction that Congress has withheld.

### *C. Textualists’ Non-Textualist Approaches to Statutes Ostensibly Conferring Broad Jurisdiction*

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Court’s reading “eviscerates what little remained of Congress’s court-limiting command.” *Id.* at \_\_\_\_ (Scalia, J., dissenting).

<sup>226</sup> 511 U.S. 375 (1994).

<sup>227</sup> *Id.* at 381–82.

<sup>228</sup> *Id.* at 377. The suit in question involved “a claim for breach of a contract, part of the consideration for which was dismissal of an earlier federal suit,” and “[n]o federal statute makes that connection (if it constitutionally could) the basis for federal-court jurisdiction over the contract dispute.” *Id.* at 382.

<sup>229</sup> See *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989). In *Newman-Green*, the Court held that a court of appeals may grant a motion to dismiss a dispensable non-diverse party in order to create jurisdiction. Justice Kennedy, joined by Justice Scalia, dissented. Kennedy agreed with the majority that 28 U.S.C. § 1653 only authorizes an appellate court to cure defects in the allegation of jurisdiction, not in jurisdiction itself, but argued that “[t]hat should be the end of the case. For if Congress thought it necessary to provide by affirmative statutory grant the rather ministerial power to cure defective allegations in jurisdiction, the more awesome power of curing actual defects in jurisdiction ought not be presumed, absent a statutory grant just as explicit.” *Id.* at 839 (Kennedy, J., dissenting).

<sup>230</sup> See, e.g., *Will v. Hallock*, 546 U.S. 345 (2006); *Swint v. Chambers County Comm’n*, 514 U.S. 35 (1995); *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495 (1989); *Van Cauwenberghe v. Baird*, 486 U.S. 517 (1988).



But the textualists on the Court have not always advanced the congressional-control model of federal jurisdiction. In cases interpreting statutes that, by their plain terms, seem to confer expansive jurisdiction, the textualists have often read the statutes atextually to find that the lower federal courts lack jurisdiction.

Recall Justice Scalia's willingness in *Hamdan* to abstain from exercising jurisdiction over the petitioner's habeas claims, even if Congress had not withheld such jurisdiction in enacting the DTA. In that case, he urged abstention out of a concern for "interbranch comity."<sup>231</sup> Interbranch comity has led the Court, and at least some of its textualists, to consider or urge abstention in other contexts, as well. In *Republic of Austria v. Altmann*,<sup>232</sup> the Court held that the Foreign Sovereign Immunities Act applies to conduct that occurred prior to its enactment, thus authorizing jurisdiction over a suit that would have been barred if filed at the time that the challenged conduct occurred.<sup>233</sup>

The Courts' textualists divided in their views of the jurisdictional question. Justice Kennedy, joined by Chief Justice Rehnquist and Justice Thomas, dissented, arguing that the statute should be read against the presumption against retroactivity.<sup>234</sup> In concluding that the federal courts lacked jurisdiction, they thus did not rely solely on the statute's plain language, instead insisting on a clear statement from Congress of retroactive effect.<sup>235</sup> In contrast, Justice Scalia both joined the Court's opinion and filed a separate concurring opinion. As is discussed below, his separate opinion could be characterized as advancing the strong congressional-control model of federal court jurisdiction, in a case in which Congress apparently expanded rather than limited lower-federal-court jurisdiction.<sup>236</sup> But Justice Scalia also joined Justice Stevens's opinion for the court, which announced the Court's willingness to "decline to exercise jurisdiction in particular cases implicating foreign sovereign immunity" in response to Executive Branch statements of interest. Such statements "might well be entitled to deference as the

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<sup>231</sup> 126 S. Ct. at 2822 (Scalia, J., dissenting).

<sup>232</sup> 541 U.S. 677 (2004).

<sup>233</sup> *Id.* at 700.

<sup>234</sup> *Id.* at 715-20, 737 (Kennedy, J., dissenting).

<sup>235</sup> *See id.* at 720-21.

<sup>236</sup> *See infra* at notes 294-299 and accompanying text; 541 U.S. at 703 (Scalia, J., dissenting) ("[A] jurisdiction-expanding statute should be applied to subsequent cases even if it sometimes has the effect of *creating* a forum where none existed.").

considered judgment of the Executive on a particular question of foreign policy,” and thus might warrant abstention.<sup>237</sup>

Although *Hamdan* and *Altmann* involved claims for abstention in the name of interbranch comity, the Court’s textualists have also urged or required the lower federal courts to decline to exercise jurisdiction that Congress ostensibly has conferred in cases that do not involve weighty questions of the separation of powers. Several decisions demonstrate the Court’s textualists’ refusing to assert apparently available jurisdiction based on atextual considerations. In *Penzoil Co. v. Texaco, Inc.*,<sup>238</sup> for example, the Court held that the district court should have abstained, under the doctrine announced in *Younger v. Harris*,<sup>239</sup> from hearing the plaintiff’s federal claims, which the judgment debtor had not presented to the Texas courts, because it was possible that the claims would be mooted by resolution of the state-court proceeding.<sup>240</sup> Justice Scalia joined the opinion, even though, as he stated in his separate concurrence, he saw “no jurisdictional bar to the Court’s decision in this case.”<sup>241</sup> The Court’s textualists also joined the Court’s opinion in *Tenet v. Doe*,<sup>242</sup> which required the dismissal of a suit by an alleged former spy seeking to enforce an espionage agreement, under the doctrine of *Totten v. United States*,<sup>243</sup> which “precludes judicial review in cases such as respondents’ where success depends upon the existence of their secret espionage relationship with the Government.”<sup>244</sup> The Court made clear that the *Totten* doctrine was effectively jurisdictional,<sup>245</sup> and Justice Scalia concurred to make clear his view that, contrary to Justice Stevens’s assertion in his own concurring opinion,<sup>246</sup> “as

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<sup>237</sup> 541 U.S. at 701–02.

<sup>238</sup> 481 U.S. 1 (1987).

<sup>239</sup> 401 U.S. 37 (1971).

<sup>240</sup> 481 U.S. at 17.

<sup>241</sup> *Id.* at 18 (Scalia, J., concurring).

<sup>242</sup> 544 U.S. 1 (2005).

<sup>243</sup> 92 U.S. 105 (1876).

<sup>244</sup> 544 U.S. at 8. Of course, it is not implausible to premise a rule such as *Totten*’s on the separation of powers, as Justice Scalia had urged in *Hamdan*. But the Court in *Tenet* relied more on the exigencies of intelligence gathering than any concern about judicial interference with Executive functions. *See id.* at 10–11.

<sup>245</sup> *See id.* at 6, n.4 (“application of the *Totten* rule of dismissal, like the abstention doctrine of *Younger* or the prudential standing doctrine, represents the sort of ‘threshold question’ we have recognized may be resolved before addressing jurisdiction.”); *id.* (“It would be inconsistent with the unique and categorical nature of the *Totten* bar—a rule designed not merely to defeat the asserted claims, but to preclude judicial inquiry—to first allow discovery or other proceedings in order to resolve the jurisdictional question.”).

<sup>246</sup> Justice Stevens argued in his concurrence that the Court’s decision means that a court can resolve the merits of a case even if there is a jurisdictional bar. *Id.* at 11–12 (Stevens, J., concurring).

applied today, the bar of *Totten* is a jurisdictional one.”<sup>247</sup> Justice Scalia thus expressly acknowledged and agreed to apply an implicit, judge-made jurisdictional bar to prevent the assertion of jurisdiction, which was presumably otherwise available under the general federal-question statute.<sup>248</sup>

Indeed, although the language of the federal-question statute is almost identical to that in Article III,<sup>249</sup> the Court has long treated the statute as conferring less than the full extent of jurisdiction authorized by the Constitution.<sup>250</sup> The textualists have, for the most part, not questioned this fundamentally atextual approach to the federal-question statute.<sup>251</sup> In *Rivet v. Regents Bank of Louisiana*,<sup>252</sup> for example, the textualist Justices joined the Court’s opinion applying the well-pleaded complaint rule in a federal question suit, even though the Court made clear long ago that the well-pleaded complaint rule is not required by the language of Article III.<sup>253</sup> And in *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*,<sup>254</sup> Justice Scalia, writing

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<sup>247</sup> *Id.* at 12 (Scalia, J., concurring).

<sup>248</sup> See 28 U.S.C. § 1331. The Supreme Court did not address the government’s contention that the Tucker Act, 28 U.S.C. § 1491(a)(1), required the respondents to file their claims in the Court of Federal Claims, rather than the district court. See 544 U.S. at 6 n.4.

<sup>249</sup> Compare 28 U.S.C. § 1331 (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”) with U.S. CONST., art. III, § 2 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .”).

<sup>250</sup> Compare *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), with *Louisville and N.R. Co. v. Mottley*, 211 U.S. 149 (1908); see Friedman, *A Different Dialogue*, *supra* note 5, at 24 (“[T]he Court consistently has interpreted the statutory grant as narrower than the jurisdiction suggested by the constitutional text. . . . Indeed, the Court has abandoned all pretense that it is following Congress’s intent in enacting the federal question jurisdictional grant . . .”).

<sup>251</sup> Indeed, there have been occasional objections to broader interpretations of the jurisdiction conferred by section 1331. In *Grable & Sons Metal Products, Inc. v. Darue Engineering and Manufacturing*, 545 U.S. 308 (2005), the Court held that there was jurisdiction under section 1331 over a state-law quiet title action that depended on the interpretation of a provision of federal tax law. The Court suggested a multi-factored, contextual inquiry for deciding whether a state-law claim arises under federal law. Justice Thomas concurred on the ground that the Court had “faithfully applie[d] our precedents interpreting 28 U.S.C. § 1331 to authorize federal-court jurisdiction over some cases in which state law creates the cause of action but requires determination of an issue of federal law,” *id.* at 320 (Thomas, J., concurring), but he indicated willingness in an appropriate case and “with the benefit of better evidence as to the original meaning of § 1331’s text” to consider adopting Justice Holmes’s creation test, see *id.* at 320 (citing *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916)); see also *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921) (Holmes, J., dissenting). Justice Thomas noted that “[j]urisdictional rules should be clear,” and lamented that current law “is anything but clear.” *Id.* at 321. Justice Thomas, in other words, is willing to consider an interpretation of section 1331 that narrows, albeit perhaps not dramatically, see *id.* at 321, the types of case that are within the federal question grant. (He was willing to assume for “present purposes” that it is proper for the Court to read section 1331 “more narrowly” than the arising under clause in Article III. See *id.* at 320, n.\*.)

<sup>252</sup> 522 U.S. 470 (1998).

<sup>253</sup> See *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824).

<sup>254</sup> 535 U.S. 826 (2002).

for the Court, read 28 U.S.C. § 1338, which confers original jurisdiction on “civil actions arising under any Act of Congress relating to patents,” implicitly to incorporate the well-pleaded complaint rule, as well.<sup>255</sup>

The textualists have not limited their atextual approach the general federal-question statute. Justice Scalia also offered a narrow interpretation of the Alien Tort Statute (ATS), which ostensibly is a broad jurisdictional grant, in *Sosa v. Alvarez-Machain*.<sup>256</sup> In *Sosa*, the Court held that the Alien Tort Statute, which confers jurisdiction on the federal courts over suits by aliens for torts committed in violation of the law of nations, authorizes courts to hear claims “in a very limited category defined by the law of nations and recognized at common law.”<sup>257</sup> The majority read the statute to authorize a narrow class of claims based on current international norms, as long as they do not have “less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.”<sup>258</sup>

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, argued in his separate opinion that the ATS does not confer discretion on the federal courts to create causes of action for the enforcement of international-law-based norms.<sup>259</sup> Justice Scalia did not deny that the ATS confers jurisdiction, but he argued that it should not be read to authorize federal common-law making by courts in the post-*Erie* era: “In holding open the possibility that judges may create rights where Congress has not authorized them to do so, the Court countenances judicial occupation of a domain that belongs to the people’s representatives,” hardly a “recipe for restraint in the future.”<sup>260</sup> Although Justice Scalia’s argument thus focused on the nature of the

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<sup>255</sup> The decision in *Holmes Group*, to be sure, was largely driven by precedent, but Justice Scalia also argued that the conclusion was based on “what the words of the statute must fairly be understood to mean.” *Id.* at 833. He argued that the phrase arising under is “familiar to all law students as invoking the well-pleaded complaint rule.” *Id.* at 833. This reading deprived the Federal Circuit of appellate jurisdiction over a declaratory judgment action that included a counterclaim arising under the patent laws, although it would not have deprived a different federal court of appeals of jurisdiction. *See id.* at 840 (Ginsburg, J., concurring in the judgment) (“The sole question presented here concerns Congress’ allocation of adjudicatory authority among the federal courts of appeals.”).

<sup>256</sup> 542 U.S. 692 (2004).

<sup>257</sup> *Id.* at 713; *see id.* at 725.

<sup>258</sup> *Id.* at 732. As in *Altmann*, the Court also suggested the possibility of abstention in a case involving a claim under the ATS. *See id.* at 733 n.21 (“Another possibility that we need not apply here is a policy of case-specific deference to the political branches. . . . In such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy.”). His opinion thus might have been driven by concerns of interbranch comity, but its approach to federal court jurisdiction is consistent with his approach in cases that do not involve such concerns.

<sup>259</sup> *Id.* at 739 (Scalia, J., concurring in part and concurring in the judgment).

<sup>260</sup> *Id.* at 747–48.

claims, if any, that can be asserted in a suit filed under the ATS’s jurisdictional grant, rather than on the scope of the jurisdictional grant itself, his view would essentially have rendered meaningless the jurisdictional grant in the statute.

The Court’s textualists have similarly not shied away from narrowly reading the grant of jurisdiction in the diversity statute.<sup>261</sup> In *Carden v. Arkoma Associates*,<sup>262</sup> the Court held, in an opinion by Justice Scalia, that the citizenship of limited partners had to be taken into account to determine diversity of citizenship in a case in which one of the parties was a limited partnership.<sup>263</sup> Justice Scalia relied principally on precedent<sup>264</sup> and Congress’s likely understanding of the statutory terms in light of precedent.<sup>265</sup> But he also insisted that the question whether any given “artificial entity” should be considered a “citizen” for diversity purposes, and “which of their members’ citizenship is to be consulted, are questions more readily resolved by legislative prescription than by legal reasoning.”<sup>266</sup> The Court thus concluded that it would “leave” such decisions “to Congress.”<sup>267</sup>

But to insist that the task of defining the citizenship of a particular party should fall to Congress simply begs the question whether Congress effectively had done so already, in enacting section 1332. There is no doubt that congressional elaboration of the term “citizen” would be helpful, but it is hardly unusual for the Court to give meaning to generalized statutory terms. The Court in *Carden* most assuredly did construe the term “citizen,” to embrace all of the individuals who constitute a partnership. But this interpretation, when viewed with Justice Scalia’s suggestion, in other contexts, about the legislative role, effectively means that in cases of statutory ambiguity, the Court should construe jurisdictional statutes in a way that defeats,

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<sup>261</sup> 28 U.S.C. § 1332.

<sup>262</sup> 494 U.S. 185 (1990).

<sup>263</sup> The relevant statutory provision is 28 U.S.C. § 1332(a)(1), which provides: “The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between . . . citizens of different States.”

<sup>264</sup> 494 U.S. at 196 (“The resolutions we have reached above can validly be characterized as technical, precedent-bound, and unresponsive to policy considerations raised by the changing realities of business organization. But, as must be evident from our earlier discussion, that has been the character of our jurisprudence in this field . . .” (citing *Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145, 153 (1965))).

<sup>265</sup> 494 U.S. at 196 (noting that Congress had amended section 1332 to modify the judicial understanding of the citizenship of corporations, and that “[n]o provision was made for the treatment of artificial entities other than corporations . . .”).

<sup>266</sup> *Id.* at 196-97.

<sup>267</sup> *Id.* at 197.

rather than confers, jurisdiction.<sup>268</sup> Such a canon might be defensible, but, as explained in Part IV, it is in serious tension with textualist claims about faithful agency and legislative supremacy.<sup>269</sup>

Indeed, the Court’s textualists have not hesitated to join opinions that have recognized judicially created, atextual exceptions to the grant of jurisdiction in the diversity statute. In *Ankenbrandt v. Richards*,<sup>270</sup> the Court held that there is an implicit domestic-relations exception to the jurisdiction conferred by the diversity statute,<sup>271</sup> which encompasses only cases involving the issuance of divorce, alimony, and child custody decrees.<sup>272</sup> The Court reached this conclusion even after acknowledging that Article III “does not mandate the exclusion of domestic relations cases from federal-court jurisdiction.”<sup>273</sup> Moreover, the Court also acknowledged that Congress had amended the diversity statute in 1948, well after the Court had first suggested the existence of an implicit domestic relations exception to the diversity jurisdiction,<sup>274</sup> to bring within the diversity jurisdiction a seemingly broader class of cases.<sup>275</sup> Justices Scalia and Kennedy, among others, joined Justice White’s opinion for the Court.

To be sure, the Court in *Ankenbrandt* offered a relatively narrow scope for the domestic-relations exception. But other members of the Court urged an even more restrained approach. In his opinion concurring in the judgment, Justice Blackmun was “unable to agree . . . that the

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<sup>268</sup> In any event, Justice Scalia and the Court’s textualists has been willing to join opinions interpreting the terms “citizens or subjects of a foreign state” to apply to somewhat murky circumstances. See *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure, Ltd.*, 536 U.S. 88 (2002) (holding that a corporation organized under the laws of the British Virgin Islands, an overseas territory of the United Kingdom, is a “citizen[n] or subject[t] of a foreign state” within the meaning of § 1332).

<sup>269</sup> The Court’s textualists have pursued such an approach in addressing other questions that the diversity statute does not specifically or plainly address, as well. In *Grupo Dataflux v. Atlas Global Group*, 541 U.S. 567 (2004), the Court, in an opinion by Justice Scalia and joined by Chief Justice Rehnquist and Justices O’Connor, Kennedy, and Thomas, held that a post-filing change in the plaintiff limited partnership’s citizenship, resulting from the withdrawal from the partnership of the two partners who at the time of filing were not diverse from the defendant, could not cure the time-of-filing defect in diversity jurisdiction. This certainly was not the only possible resolution of the case, particularly in light of precedent. See *id.* at 588–90 (Ginsburg, J., dissenting) (arguing that the rationale of *Caterpillar v. Lewis*, 519 U.S. 61 (1996), permits a post-filing change to cure a jurisdictional defect, raised for the first time after a jury verdict).

<sup>270</sup> 504 U.S. 689 (1992).

<sup>271</sup> *Id.* at 700-01.

<sup>272</sup> *Id.* at 704.

<sup>273</sup> *Id.* at 697.

<sup>274</sup> The genesis of the domestic-relations exception was the Court’s decision in *Barber v. Barber*, 62 U.S. 582 (1859), which did not mention the diversity statute.

<sup>275</sup> 504 U.S. at 698–700 (noting that in 1948 Congress amended the statute to change the phrase “all suits of a civil nature at common law or in equity” to “all civil actions”).

diversity statute contains any ‘exception’ for domestic relations matters.”<sup>276</sup> In reaching that conclusion, he relied on the language of the then-current diversity statute, arguing that a “change in language that, if anything, expands the jurisdictional scope of a statute” is meager evidence “of approval of a prior narrow construction,” particularly a prior construction that was, at best, only implicit in the Court’s prior decisions.<sup>277</sup>

It is perhaps telling that Justice Scalia joined the Court’s opinion in *Ankenbrandt*. Justice White, writing for the Court, argued that “[w]hen Congress amended the diversity statute in 1948 to replace the law/equity distinction”—which had been part of the basis for the Court’s original suggestion of a domestic-relations exception<sup>278</sup>—“with the phrase ‘all civil actions,’ we presume Congress did so with full cognizance of the Court’s nearly century-long interpretation of the prior statutes, which had construed the statutory diversity jurisdiction to contain an exception for certain domestic relations matters.”<sup>279</sup> Yet six years after joining Justice White’s opinion, Justice Scalia, in dissent in *Stewart v. Martinez-Villareal*,<sup>280</sup> which interpreted AEDPA’s modifications to the habeas regime, criticized the Court for “flout[ing] the unmistakable language of the statute to avoid what it calls a ‘perverse’ result,” when the only thing perverse “about the result that the statute commands . . . [is] that it contradicts pre-existing judge-made law, which it was precisely the purpose of the statute to change.”<sup>281</sup> There is nothing inherently wrong, as a matter of statutory interpretation, with such an argument, but it would seem to apply with equal force to the diversity statute. The “pre-existing judge-made law” in the context of the diversity statute, however, unlike the pre-AEDPA body of law, deprived rather than expanded federal-court jurisdiction. In each case, Justice Scalia chose the construction that limited federal-court jurisdiction.

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<sup>276</sup> *Id.* at 707 (Blackmun, J., concurring in the judgment).

<sup>277</sup> *Id.* at 708. Indeed, Justice Stevens, joined by Justice Thomas, would have left for another day whether there is a domestic-relations exception to the diversity jurisdiction, finding it clear that, even if there is such an exception, it did not apply to that case. *Id.* at 717–18 (Stevens, J., concurring in the judgment).

<sup>278</sup> The appellant in *Barber* had argued that the federal courts lacked jurisdiction over matters related to divorce and alimony because such matters were exclusively ecclesiastical at the time of the adoption of the Constitution, and thus that the phrase “law and equity” did not embrace cases addressing such subjects. See *Ankenbrandt*, 504 U.S. at 693–94.

<sup>279</sup> *Id.* at 700.

<sup>280</sup> 523 U.S. 637 (1998).

<sup>281</sup> *Id.* at 646 (Scalia, J., dissenting).

A unanimous Court similarly concluded, in *Marshall v. Marshall*,<sup>282</sup> that the probate exception to federal jurisdiction does not apply to deprive a bankruptcy court of jurisdiction over a claim that a third party tortiously interfered with a widow's expectancy of inheritance from her deceased husband. The Court noted that the exception is a "judicially created doctrine[]" stemming in large measure from misty understandings of English legal history,"<sup>283</sup> and made clear its desire to curtail "sweeping extension[s]" of the exception.<sup>284</sup> But as in *Ankenbrandt*, the Court, whose opinion all of the Court's textualists joined,<sup>285</sup> did not abandon the exception,<sup>286</sup> even though Justice Stevens urged the Court to do.<sup>287</sup>

It is possible, of course, that the limitations that have been imposed by the Court or proposed by individual Justices on the diversity jurisdiction reflect a frequently noted judicial hostility to that particular grant of jurisdiction.<sup>288</sup> But the Court's consistently stingy interpretation of the diversity statute is in fact consistent with the larger pattern identifiable in its treatment of other statutory grants of jurisdiction. And the judicial willingness to decline to exercise jurisdiction that Congress seems to have granted—whether expressed as a form of abstention doctrine, as in *Penzoil*, as a limitation implicit in the statute's terms, as in *Carden*, or as a judicially created exception to the statute's grant of jurisdiction, as in *Ankenbrandt* and *Marshall*—is in considerable tension with the congressional-control model of federal jurisdiction. Indeed, Martin Redish, an avid proponent of the strong congressional-control model both for jurisdiction-ousting and jurisdiction-conferring statutes, has compared the diversity exceptions to other partial abstention doctrines<sup>289</sup> and argued that both are equally

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<sup>282</sup> 126 S. Ct. 1735 (2006).

<sup>283</sup> *Id.* at 1741.

<sup>284</sup> *Id.*

<sup>285</sup> Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito all joined Justice Ginsburg's opinion for the Court.

<sup>286</sup> *Id.* at 1748 ("[T]he probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court.").

<sup>287</sup> See *id.* at 1750-52 (Stevens, J., concurring in part and concurring in the judgment) ("I write separately to explain why I do not believe there is any 'probate exception' that ousts a federal court of jurisdiction it otherwise possesses.").

<sup>288</sup> See Friedman, *A Different Dialogue*, *supra* note 5, at 25-28 ("These decisions make sense only when one recognizes that the Court has little use for the diversity jurisdiction and has urged its curtailment whenever possible."); Richard D. Freer, *The Cauldron Boils: Supplemental Jurisdiction, Amount in Controversy, and Diversity of Citizenship Class Actions*, 53 EMORY L.J. 55, 60 (2004) (*hereinafter*, Freer, *The Cauldron Boils*).

<sup>289</sup> See Redish, *Abstention*, *supra* note 6, at 102-05.



constitutionally problematic as a matter of the separation of powers.<sup>290</sup> More important for present purposes, the textualists' willingness to abstain or to read statutory grants of jurisdiction to include implicit exceptions suggests a very different view of Congress's authority to control the federal jurisdictional regime than do the cases described in the prior section, in which the textualists regularly insisted that it impermissibly ignores Congress's authority to exercise jurisdiction that Congress did not explicitly confer upon the federal courts.

#### *D. Counter-Trends: Textualist Approaches to Statutes Ostensibly Conferring Broad Jurisdiction*

All of this is not to suggest that the Court's textualists *always* depart from textualist approaches to the broad statutory grants of jurisdiction. In most cases in which jurisdiction is premised on those statutes, after all, there is no colorable contention that the Court does not have, or ought not to exercise, jurisdiction. But the Court tends to address only difficult cases, or at least those cases in which there is more than one colorable argument.<sup>291</sup> In those cases, as illustrated above, the Court's textualists have departed from plain statutory text to find that the federal courts lack jurisdiction with surprising frequency.

Yet even among the difficult cases in which there are colorable arguments both for and against federal jurisdiction, there are some notable exceptions to the pattern described above. As a preliminary matter, it is possible to view the position of the Court's textualists in *Ankenbrandt* and *Marshall*, and Justice Scalia's position in *Altmann*, as evidence of a willingness to read even expansive statutory grants of jurisdiction according to their plain terms. In *Ankenbrandt* and *Marshall*, after all, the textualists joined opinions that arguably *narrowed* judicially crafted, atextual exceptions—the domestic-relations and probate exceptions, respectively—to federal-court jurisdiction.<sup>292</sup> But as noted above, some members of the Court in those cases urged

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<sup>290</sup> See *id.* at 75-79 (arguing that abstention doctrine are inconsistent with American political theory because it involves courts refusing to exercise jurisdiction that Congress has granted); Gunther, *Subtle Vices*, *supra* note 50, at 9-15 (criticizing as unprincipled Bickelian discretionary devices to avoid deciding cases); Friedman, *A Different Dialogue*, *supra* note 5, at 18-20 (describing "almost universal view that abstention manifests judicial jurisdictional decisionmaking with no pretense of congressional guidance.").

<sup>291</sup> See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 16 (1984).

<sup>292</sup> See RICHARD H. FALLON, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 2006 SUPPLEMENT 135 ("Almost self-evidently, *Marshall* reflects an ongoing pattern of Supreme Court reassessments of and cut-backs on judicially developed doctrines limiting federal jurisdiction or treating its exercise as discretionary.").

wholesale rejection of the exceptions, which the Court, and its textualists, declined to do.<sup>293</sup> In *Altmann*, Justice Scalia argued in his separate opinion that the Court had not properly taken account of the “consistent practice of giving immediate effect to statutes that alter a court’s jurisdiction,”<sup>294</sup> a practice that, in that case, required the conclusion that the Court had jurisdiction over the petitioner’s claims. In this respect, Justice Scalia appeared to endorse the strong congressional-control model of federal jurisdiction both for statutes conferring and ousting jurisdiction.<sup>295</sup> But the bulk of Justice Scalia’s argument appeared directed toward demonstrating that jurisdiction-ousting statutes should be applied to pending cases,<sup>296</sup> a matter over which Justice Scalia had previously sparred with his non-textualist colleagues.<sup>297</sup> Ultimately, though, Justice Scalia joined the Court’s opinion, which also held open the possibility that the Court would abstain in cases implicating foreign sovereign immunity.<sup>298</sup> Meanwhile, the Court’s other textualists were in dissent, arguing that the Court should not have found jurisdiction over the plaintiff’s claims.<sup>299</sup> *Ankenbrandt*, *Marshall*, and *Altmann* thus are not powerful counter-examples of the pattern described above.

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<sup>293</sup> In addition, the Court’s willingness in *Marshall* to reject a probate exception to federal jurisdiction might be explained by the fact that the case did not arise in the context of diversity jurisdiction, but rather involved jurisdiction premised on 28 U.S.C. § 1334, the statute vesting federal courts with jurisdiction over bankruptcy cases and related proceedings. Whereas the probate exception frequently has been invoked by the courts of appeals (and occasionally by the Supreme Court) in cases premised on diversity of citizenship, *see, e.g.*, *Sutton v. English*, 246 U.S. 199, 205-07 (1918); *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 45 (1909); *Turja v. Turja*, 118 F.3d 1006, 1009-10 (4<sup>th</sup> Cir. 1997); *Bennett v. Bennett*, 682 F.2d 1039, 1042 (D.C. Cir. 1982); *Crouch v. Crouch*, 566 F.2d 486, 487-88 (5<sup>th</sup> Cir. 1978), to which the Court has long seemed hostile, *see, e.g.*, *Friedman, A Different Dialogue*, *supra* note 5, at 27-28; *Freer, The Cauldron Boils*, *supra* note 288, at 60, bankruptcy has a long pedigree as a quintessentially federal basis for jurisdiction, *cf.* U.S. CONST., art. I, § 8, cl. 4. And as the Court noted, the “broad grant of jurisdiction conferred by § 1334(b) is subject to a mandatory abstention provision applicable to certain state-law claims” that did not embrace the claims at issue in *Marshall*, and that is, “in turn, qualified.” *Marshall*, 126 S. Ct. at 1746 n.3.

<sup>294</sup> 541 U.S. at 292 (Scalia, J., concurring).

<sup>295</sup> *Id.* at 292–03 (Scalia, J., concurring) (“Our jurisdiction cases are explained, I think, by the fact that the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power—so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised.”).

<sup>296</sup> *Id.* at 292 (Scalia, J., concurring) (critiquing the Court’s view of retroactivity by noting that new jurisdictional rules do not always “take[] away no substantive right but simply change[] the tribunal that is to hear the case,” because a “jurisdictional rule can deny a litigant a forum for his claim entirely . . . or may leave him with an alternate forum that will deny relief for some collateral reason ( *e.g.*, a statute of limitations bar”); *id.* at 292-93 (supporting view by arguing that “applying a jurisdiction-eliminating statute to undo past judicial action would be applying it retroactively; but applying it to prevent any judicial action after the statute takes effect is applying it prospectively.”).

<sup>297</sup> *See Lindh v. Murphy*, 521 U.S. 320 (1997).

<sup>298</sup> *See Altmann*, 541 U.S. at 701-02; *supra* notes 232– 237 and accompanying text.

<sup>299</sup> *See Altmann*, 541 U.S. at 715-20 (Kennedy, J., dissenting, joined by Chief Justice Rehnquist and Justice Thomas).

Other cases, however, suggest more willingness on the part of the Court’s textualists to read statutes ostensibly conferring expansive jurisdiction according to their plain language. In *Exxon Mobil Corp. v. Allapattah Serv., Inc.*,<sup>300</sup> a divided Court held that a federal court sitting in diversity may exercise supplemental jurisdiction under 28 U.S.C. § 1367 over additional plaintiffs whose claims do not satisfy the minimum amount-in-controversy requirement, provided that the claims are part of the same case or controversy as the claims of plaintiffs who do allege a sufficient amount in controversy.<sup>301</sup> Justice Kennedy, writing for the Court in an opinion that Justices Scalia and Thomas joined, stated that “[w]e must not give jurisdictional statutes a more expansive interpretation than their text warrants.” But he also insisted that “it is just as important not to adopt an artificial construction that is narrower than what the text provides,” because “[n]o sound canon of interpretation requires Congress to speak with extraordinary clarity in order to modify the rules of federal jurisdiction within appropriate constitutional bounds.”<sup>302</sup> The Court thus relied on section 1367’s “text in light of context, structure, and related statutory provisions,”<sup>303</sup> and found the statute to be a “broad jurisdictional grant, with no distinction between pendent-claim and pendent-party cases.”<sup>304</sup> The Court also declined to treat arguably contrary indications in the statute’s legislative history as authoritative evidence of congressional intent, offering the familiar textualist critique of reliance on legislative history.<sup>305</sup>

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<sup>300</sup> 545 U.S. 546 (2005).

<sup>301</sup> *Id.* at 549.

<sup>302</sup> *Id.* at 558.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.* at 559.

<sup>305</sup> Justice Kennedy explained:

As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature’s understanding of otherwise ambiguous terms. Not all extrinsic materials are reliable sources of insight into legislative understandings, however, and legislative history in particular is vulnerable to two serious criticisms. First, legislative history is itself often murky, ambiguous, and contradictory. . . . Second, judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members-or, worse yet, unelected staffers and lobbyists-both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text. We need not comment here on whether these problems are sufficiently prevalent to render legislative history inherently unreliable in all circumstances, a point on which Members of this Court have disagreed. It is clear, however, that in this instance both criticisms are right on the mark.

*Id.* at 567–69.

*Allapattah* is a puzzling decision. Although the majority argued that the statute was “unambiguous,”<sup>306</sup> and read literally section 1367(b)’s exceptions to the jurisdiction conferred in section 1367(a),<sup>307</sup> it is difficult to characterize the Court’s interpretation of section 1367(a) as obviously textualist. To reach its conclusion, the majority was forced to read section 1367(a)’s phrase “civil action” to mean “claim.”<sup>308</sup> To be sure, this reading was eminently defensible, but the reasons why it is defensible are largely independent of the plain text of the provision.<sup>309</sup> Even if the Court’s approach in *Allapattah* was not purely textualist, the fact remains that the Court’s textualists voted in favor of a more expansive interpretation of a federal jurisdictional statute than some of their non-textualist colleagues were prepared to accept.<sup>310</sup> One possible explanation is that there were instrumental justifications for the competing views of the supplemental jurisdiction statute: The Court’s substantive conservatives supplied an expanded

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<sup>306</sup> *Id.* at 567.

<sup>307</sup> *Id.* at 565-67. Section 1367(a) provides:

Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

Section 1367(b) provides:

In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

28 U.S.C. § 1367.

<sup>308</sup> See *id.* at 560-64; see generally Pfander, *Supplemental Jurisdiction*, supra note 5, at 154-160.

<sup>309</sup> See, e.g., John B. Oakley, *Integrating Supplemental Jurisdiction and Diversity Jurisdiction: A Progress Report on the Work of the American Law Institute*, 74 IND. L.J. 25, 45 (1998) (arguing for “claim-specific” interpretation of jurisdictional provisions, including section 1367, that are phrased in “action-specific” language); Freer, *The Cauldron Boils*, supra note 288, at 79-83. Section 1367 is far from a model of clear drafting, and any interpretation based on its plain text would create a puzzling and unsatisfying regime of supplemental jurisdiction. See, e.g., Richard D. Freer, *Toward a Principled Statutory Approach to Supplemental Jurisdiction in Diversity of Citizenship Cases*, 74 IND. L.J. 5, 12-22 (1998) (providing overview of problems with section 1367(b)).

<sup>310</sup> Justice Ginsburg, joined by Justices Stevens, O’Connor, and Breyer, argued in dissent that the statutory predicate of a “civil action of which the district courts have original jurisdiction” was not satisfied in an action premised solely on diversity of citizenship when some of the plaintiffs failed to meet the amount-in-controversy requirement. *Id.* at 584-95 (Ginsburg, J., dissenting); see also Pfander, *Supplemental Jurisdiction*, supra note 5, at 127-53.

avenue for defendants in class actions to remove to federal court,<sup>311</sup> where the prospect of windfall judgments has diminished in recent years,<sup>312</sup> and the Court's liberals resisted this effort.

*Allapattah* is not the only case in which the Court's textualists read section 1367 to confer expansive federal jurisdiction. In *City of Chicago v. International College of Surgeons*,<sup>313</sup> the Court (including all of its textualists) held that 28 U.S.C. § 1441 permitted removal of constitutional claims challenging state designation of landmark status.<sup>314</sup> In addition, the Court held that section 1367 authorized federal court jurisdiction over related state-law claims, even though the state-law claims called for deferential on-the-record review of state administrative findings.<sup>315</sup> Justice O'Connor relied on the text of section 1367, finding no exception for "claims that require on-the-record review of a state or local administrative determination" and noting that "the statute generally confers supplemental jurisdiction over 'all other claims' in the same case or controversy as a federal question, without reference to the nature of review."<sup>316</sup> But even this reliance on the statute's plain text was qualified; the Court noted that "there may be situations in which a district court should abstain from reviewing local administrative determinations even if the jurisdictional prerequisites are otherwise satisfied."<sup>317</sup> Accordingly, although the Court's textualists followed the plain meaning of a broad grant of jurisdiction, they reserved the prerogative to limit jurisdiction through abstention.

But the Court's textualists have not always upheld plausible claims for abstention in cases premised on the ostensibly expansive grant of jurisdiction in the general federal-question statute. In *New Orleans Public Service, Inc. v. Council of City of New Orleans*,<sup>318</sup> (*NOPSI*) for example, Justice Scalia wrote the opinion for a unanimous Court declining to extend the *Younger*<sup>319</sup> and *Burford*<sup>320</sup> abstention doctrines to a case challenging completed legislative

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<sup>311</sup> Cf. Class Action Fairness Act, Pub. L. 109-2, 119 Stat. 4.

<sup>312</sup> See, e.g., Judith Resnik, *Constricting Remedies: The Rehnquist, Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 296–305 (2003); Edward F. Sherman, *Class Actions in the Gulf South Symposium*, 74 TUL. L. REV. 1603, 1607 (2000).

<sup>313</sup> 522 U.S. 156 (1997).

<sup>314</sup> *Id.* at 164–66.

<sup>315</sup> *Id.* at 171–72.

<sup>316</sup> *Id.* at 169; see *id.* ("Congress could of course establish an exception to supplemental jurisdiction for claims requiring deferential review of state administrative decisions, but the statute, as written, bears no such construction.").

<sup>317</sup> *Id.* at 174.

<sup>318</sup> 491 U.S. 350 (1989).

<sup>319</sup> *Younger v. Harris*, 401 U.S. 37 (1971).

<sup>320</sup> *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

action.<sup>321</sup> He emphasized that “cases have long supported the proposition that federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred.”<sup>322</sup> Justice Scalia went so far as to declare that underlying that proposition “is the undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds.”<sup>323</sup> Similarly, in *Quackenbush v. Allstate Ins. Co.*,<sup>324</sup> the Court (in an opinion by Justice O’Connor) limited abstention doctrine by concluding that “federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary,” and thus held that the district court’s remand order in a damages action was “an unwarranted application of the *Burford* doctrine.”<sup>325</sup> Justice Kennedy concurred, stating that “[w]e need not rule out . . . the possibility that a federal court might dismiss a suit for damages in a case where a serious affront to the interests of federalism could be averted in no other way.”<sup>326</sup> This prompted Justice Scalia to concur separately to make clear his belief that such discretionary dismissals are not available. As he did in *NOPSI*, Justice Scalia urged application of the strong congressional-control model, arguing that “[t]here is no ‘serious affront to the interests of federalism’ when Congress lawfully decides to pre-empt state action—which is what our cases hold (and today’s opinion affirms) Congress does whenever it instructs federal courts to assert jurisdiction over matters as to which relief is not discretionary.”<sup>327</sup> Justice Scalia did not, however, question the propriety of abstention doctrine more generally, at least in cases in which the interest in judicial federalism was more pronounced.

The cases discussed in this section make clear that the Court’s textualists have not always upheld claims for abstention from exercising otherwise broad statutory grants of jurisdiction. Indeed the textualists are clearly of two minds in such cases, perhaps torn (as I discuss in detail

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<sup>321</sup> 491 U.S. at 372-73.

<sup>322</sup> *Id.* at 358

<sup>323</sup> *Id.* at 358–59. His opinion for the Court characterized the *Younger* and *Burford* abstention cases as not being about jurisdiction *per se*, but rather about “the federal courts’ discretion in determining whether to grant certain types of relief—a discretion that was part of the common-law background against which the statutes conferring jurisdiction were enacted.” *Id.* at 359.

<sup>324</sup> 517 U.S. 706 (1996).

<sup>325</sup> *Id.* at 731.

<sup>326</sup> *Id.* at 733 (Kennedy, J., concurring).

<sup>327</sup> *Id.* at 732 (Scalia, J., concurring (quoting *id.* at 733 (Kennedy, J., concurring))); see Meltzer, *Jurisdiction and Discretion Revisited*, *supra* note 56, at 1893–94 (arguing that *Quackenbush* and *NOPSI* are inconsistent with Shapiro’s argument about discretion).

in the section that follows) between the competing mandates of faithful agent theory and judicial minimalism. Fittingly, the cases discussed here all involved the abstention side of the congressional-control question—that is, jurisdictional grants that, by their plain terms, appear to confer expansive jurisdiction. It is telling that there have been almost no cases in which the Court’s textualists have read a statute ostensibly *ousting* the federal courts of jurisdiction to do less than its plain terms suggest.

#### IV. TEXTUALISM AND JURISDICTION

The discussion in Part III demonstrated that although the Court’s textualist-leaning Justices have consistently applied a textualist approach to jurisdiction-ousting statutes, they have not been as consistent in interpreting statutes that appear to grant jurisdiction without exception. In this Part, I consider explanations for the selective approach of the Court’s textualists to jurisdictional statutes. I then turn to what the approach of the Court’s textualists to jurisdictional statutes reveals both about textualism and, more broadly, about the debate over the appropriate roles of Congress and the federal courts in crafting a jurisdictional regime.

##### *A. Explanations for the Selective Application of Textualism to Jurisdictional Statutes*

###### 1. Fidelity v. Judicial Constraint

Textualists contend that courts should be faithful agents of the legislature, and, accordingly, that courts should implement only those instructions that appear in the plain text of legislative enactments. As John Manning has argued, this conviction leads them to “subscribe to the general principle that texts should be taken at face value—with no implied extensions of specific texts or exceptions to general ones—even if the legislation will then have an awkward relationship to the apparent background intention or purpose that produced it.”<sup>328</sup> Faithful agency, in other words, requires strict adherence to the statutory text.

Textualism also proceeds from the assumption that the exercise of judicial power, unless properly cabined, tends towards impermissible judicial lawmaking, in tension with constitutional

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<sup>328</sup> Manning, *Legislative Intent*, *supra* note 65, at 424–25; *see also supra*, notes 65–70, 81–82 and accompanying text.

structure and basic democratic theory.<sup>329</sup> As noted in Part II, textualists have argued that limiting judges to the consideration of text in statutory construction more effectively constrains judicial discretion than other approaches to statutory interpretation, and thus more effectively serves democratic objectives. Textualists often argue that it is not only important to constrain judges from doing mischief in cases that are properly before them, but also that, as a general matter, it is desirable in a democracy to limit the range of cases in which judges have authority to act at all. In *Sosa v. Alvarez-Machain*, for example, Justice Scalia lamented that the Court “seems incapable of admitting that some matters—*any* matters—are none of its business.”<sup>330</sup> The most prominent textualists regularly have expressed concern about preserving “the proper—and properly limited—role of the courts in a democratic society.”<sup>331</sup>

When Congress enacts a statute purporting to oust the courts of jurisdiction, the textualist judge who implements Congress’s plain statutory instructions limits, by definition, the authority of the judiciary. In such cases, the textualist judge can simultaneously fulfill textualism’s mandate that the judge act as a faithful agent of Congress, based on enacted statutory text, and textualism’s urge to constrain both judicial discretion and judicial authority. Accordingly, it is not surprising to find, as demonstrated above, that the Court’s textualists have regularly relied strictly on statutory text in construing jurisdiction-ousting statutes.<sup>332</sup>

Matters are more complicated for the textualist judge when Congress enacts a statute with plain text purporting to confer expansive jurisdiction on the courts. A methodologically faithful textualist judge presumably would construe it according to its plain terms, declining to create implicit exceptions to the statutory grant of authority. After all, textualism’s “general principle that texts should be taken at face value—with no implied extensions of specific texts or exceptions to general ones”<sup>333</sup> seems quite specifically to enjoin the textualist judge from finding implicit limitations in broad statutory conferrals of jurisdiction. Such an approach both ensures faithful agency and advances the general textualist preference to construe congressional

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<sup>329</sup> See, e.g., Scalia, *supra* note 9, at 22.

<sup>330</sup> 542 U.S. at 750 (Scalia, J., concurring in part and concurring in the judgment).

<sup>331</sup> *Massachusetts v. EPA*, 127 S. Ct. 1438, 1471 (2007) (Roberts, C.J., dissenting) (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)). Chief Justice Roberts’s dissent was joined by Justices Scalia, Thomas, and Alito.

<sup>332</sup> See *supra* Part III.B.

<sup>333</sup> Manning, *Textualism and Legislative Intent*, *supra* note 65, at 424–25.



decisions to create rule-like directives.<sup>334</sup> As demonstrated above, however, when called upon to construe broad jurisdictional grants, the textualist's desire to be a faithful agent conflicts with the more generalized impulse to limit judicial authority. Faithful application of broad, jurisdiction-creating statutes, after all, results in a broader range of cases in which judges can exercise authority, notwithstanding what textualists like to describe as the "properly limited" role of the judiciary in our democratic system. Textualists have struggled with jurisdiction-conferring statutes because such statutes reveal a fundamental tension in the theoretical underpinnings of their methodology. The discussion above demonstrates that textualists have often resolved this tension by sacrificing their faithful agency to Congress's plain instructions, in the name of restricting judicial authority.

Of course, in interpreting jurisdiction-conferring statutes implicitly to limit judicial authority, textualists arguably condone the sort of judicial lawmaking that reliance on plain text is supposed to constrain. After all, as Justice Scalia has warned, judges freed from the constraining effect of text might be tempted to "pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field."<sup>335</sup> But textualist judges appear to have concluded that this is sometimes a risk worth accepting, because the result of such atextual interpretation is to prevent the courts from acting *at all* in some range of cases otherwise embraced by the plain terms of the jurisdictional grant. In these cases, the impulse to limit judicial involvement altogether has prevailed over the impulse to limit judicial discretion in interpreting statutes. Thus it is little surprise that cases in which textualist judges have offered atextual interpretations of jurisdictional statutes in recent years have involved statutes that purported to confer broad jurisdiction, rather than statutes that purported to deprive the courts of jurisdiction that they previously had exercised.

## 2. Other Explanations

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<sup>334</sup> See Nelson, *What is Textualism*, *supra* note 70, at 401; cf. Adrian Vermeule, *Interpretive Choice*, *supra* note 10, at 79 (concluding that the interest in reducing the costs of judicial decision-making and of legal uncertainty argue in favor of formalist, rule-based approaches to interpretation).

<sup>335</sup> Scalia, *supra* note 9, at 18. Daniel Meltzer has argued that "if one embraces a lawmaking role for courts in rounding out the edges of jurisdictional enactments, that role will inevitably involve courts in making decisions that might be variously characterized as substantive, controversial, value-laden, or political." Meltzer, *Jurisdiction and Discretion Revisited*, *supra* note 56, at 1903. This obviously is at odds with the textualist view of judging.

To be sure, there are other plausible explanations for the account provided here of textualists' interpretation of jurisdictional statutes. Specifically, I consider the extent to which the constraint of precedent, concerns for federalism or separation of powers, and results-oriented interpretation might account for the textualists' approach to jurisdictional statutes. I conclude, however, that each of these explanations ultimately is not as convincing as the account provided above, at least if textualists' claims about their methodology are to retain any normative force.

*a. The Constraint of Precedent*

One possibility is the constraining force of precedent, which the Court has long found to be particularly potent in cases involving statutory interpretation.<sup>336</sup> After all, many of the recent decisions finding implicit exceptions to broad statutory grants of jurisdiction rely at least in part on older cases that initially carved out such exceptions. This certainly is the case for the well-pleaded complaint rule<sup>337</sup> and the domestic-relations<sup>338</sup> and probate<sup>339</sup> exceptions to the diversity jurisdiction.<sup>340</sup> But *stare decisis* cannot fully explain the account developed here, because textualists have been willing to take a narrow view of the constraining force of precedent when the result would be to reduce, rather than expand, the federal courts' jurisdiction. In *Finley v. United States*,<sup>341</sup> for example, Justice Scalia's opinion for the Court declined to apply the generous approach to federal-court jurisdiction that *United Mine Workers v. Gibbs*<sup>342</sup> had applied to a case involving pendent-claim jurisdiction. In addition, the textualists have been willing to recognize implicit exceptions to federal jurisdiction even in cases for which there was no obviously applicable prior case law construing the jurisdictional statute at issue.<sup>343</sup> At best, the

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<sup>336</sup> See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–173 (1989) (“Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.”).

<sup>337</sup> See *Holmes Group*, 535 U.S. at 830 (citing *Phillips Petroleum Co. v. Texaco Inc.*, 415 U.S. 125, 127–128 (1974)). *Phillips Petroleum*, in turn, relied on the Court's earlier decision in *Mottley*. See 415 U.S. at 128.

<sup>338</sup> See *Ankenbrandt*, 504 U.S. at 693–97 (discussing *Barber v. Barber*, 62 U.S. 582 (1859)).

<sup>339</sup> See *Marshall*, 126 S. Ct. at 11746–48 (discussing *Markham v. Allen*, 326 U.S. 490 (1946)).

<sup>340</sup> It is true, as well, for the complete diversity rule, which is judicially created. See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

<sup>341</sup> 490 U.S. 545 (1989).

<sup>342</sup> 383 U.S. 715 (1966).

<sup>343</sup> See, e.g., *Hamdan*, 126 S. Ct. at 2810–18 (Scalia, J., dissenting) (interpreting the recently enacted Detainee Treatment Act); *Altmann*, 541 U.S. 716–31 (Kennedy, J., dissenting) (considering whether Foreign Sovereign Immunities Act applies retroactively).

constraint of precedent can be only a partial explanation for the textualists' selective application of textualist approaches to jurisdictional statutes.

*b. Federalism and Separation-of-Powers Concerns*

Another possible explanation for the selective application of textualist methodology to jurisdictional statutes flows from the courts' long-standing tendency to view jurisdictional statutes as *sui generis*. The exercise of jurisdiction often implicates federalism<sup>344</sup> and separation-of-powers concerns,<sup>345</sup> and for these reasons courts<sup>346</sup> and commentators<sup>347</sup> have suggested that conventional approaches to statutory interpretation might not apply—or not apply in their normal fashion—to jurisdictional statutes. These concerns have led courts to apply various canons of construction and judicially developed presumptions to limit the exercise of judicial power.

There is little doubt that these separation-of-powers and federalism concerns have played an important role in judicial interpretation of jurisdictional statutes. At least since *Marbury v. Madison*,<sup>348</sup> the courts have been acutely aware of the conflict of interest inherent in courts' interpreting of statutes that define the scope of their own power. With regard to federalism, the Court has frequently insisted that “[d]ue regard for the rightful independence of state governments . . . requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defined.”<sup>349</sup> These twin concerns—the concern about judicial aggrandizement and the desire to promote judicial federalism—have led the Court, albeit

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<sup>344</sup> See Shapiro, *Jurisdiction and Discretion*, *supra* note 7, at 581 (“[F]ederalism and comity concerns have been critical to the exercise of discretion in the federal courts and should remain so.”).

<sup>345</sup> See *id.* at 574 (“[Q]uestions of jurisdiction are of special concern to the courts because they intimately affect the courts’ relations with each other as well as with the other branches of government. Therefore the continued existence of measured authority to decline jurisdiction does not endanger, but rather protects, the principle of separation of powers”); Debra Lyn Bassett, *Statutory Interpretation in the Context of Federal Jurisdiction*, 76 GEO. WASH. L. REV. 52, 53 (arguing that “separation-of-powers principles impose exceptional interpretive constraints on federal courts’ constructions of their own judicial power”).

<sup>346</sup> See, e.g., *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108–09 (1941).

<sup>347</sup> See, e.g., Bassett, *supra* note 345, at 53 (arguing that “the context of federal jurisdiction raises distinctive statutory interpretation issues”).

<sup>348</sup> 5 U.S. (1 Cranch) 137 (1803); see also *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126 (1804) (holding that plaintiff had not waived right to challenge the subject matter jurisdiction of federal court in which he had filed the suit).

<sup>349</sup> *Healy v. Ratta*, 292 U.S. 263, 270 (1934) (quoted in *Finley*, 490 U.S. at 553, and *Syngenta Crop Protection, Inc. v. Henson*, 533 U.S. 28, 42 (2002)).

erratically, to insist that it should refrain from reading jurisdictional statutes “broadly”<sup>350</sup> and instead should “strictly constru[e]” them.<sup>351</sup>

Such canons and presumptions help to explain a general reluctance to find federal-court jurisdiction in any case, and also explain the textualists’ insistence on strict construction of jurisdiction-ousting statutes. They arguably provide a basis for the domestic-relations and probate exceptions to the diversity jurisdiction, as those are areas traditionally considered within the cognizance of the states.<sup>352</sup> They might also justify abstention in cases such as *Tenet v. Doe*,<sup>353</sup> which involved a claim seeking review of executive branch actions implicating national security. Indeed, they may even lend support to a general presumption against the exercise of jurisdiction. But these canons and presumptions, which perhaps account in part both for the textualists’ strict construction of jurisdiction-ousting statutes and for their willingness to read atextually statutes purporting to confer expansive jurisdiction, stand in uneasy tension with textualists’ own claims about the importance of ensuring that courts remain faithful agents of Congress. Although there may be powerful reasons for courts to be reluctant to find that Congress has conferred jurisdiction, a presumption against jurisdiction—whether enforced because of federalism concerns, separation-of-powers concerns, or other reasons—is in serious tension with the essential textualist claims about the judicial role in statutory interpretation, at least when the statute at issue does not, on its face, admit of exceptions. Federalism and separation-of-powers concerns may indeed provide powerful justifications for the creation of judicially implied exceptions to broad jurisdictional grants, but such departures from statutory language do not seem faithful—to use some of the textualists’ favorite bromides—to the “precise limits” that the relevant statute “has defined.”<sup>354</sup>

This is not to say that attention to federalism and separation-of-powers concerns is irreconcilable with textualism. To the contrary, they tend to go hand in hand when Congress has enacted a statute that limits the federal courts’ jurisdiction or divests them of jurisdiction outright. But when Congress purports to confer jurisdiction to the limits permitted under Article

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<sup>350</sup> *Finley*, 490 U.S. at 549.

<sup>351</sup> *Murphy Bros., Inc.*, 526 U.S. at 357 (Rehnquist, C.J., dissenting) (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108–09 (1941)).

<sup>352</sup> *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995).

<sup>353</sup> 92 U.S. 105 (1876).

<sup>354</sup> *Healy*, 292 U.S. at 270.

III, reliance on federalism and separation-of-powers based presumptions substantially diminishes the force and purity of textualism, which inhere in the courts' treating the plain text of legislative enactments as the only authoritative statement of statutory meaning. Indeed, Justice Scalia himself has made this very argument. He has professed to be generally skeptical of "presumptions and rules of construction that load the dice for or against a particular result," because they not only "increase the unpredictability, if not the arbitrariness, of judicial decisions" but are also arguably beyond the authority of the courts to impose.<sup>355</sup> It may well be true that such presumptions make statutory interpretation more rule-based<sup>356</sup>—which produces virtues of its own<sup>357</sup>—but they are not virtues that flow necessarily from a theory of faithful agency based on the statutory text.<sup>358</sup> Concerns about comity and the separation of powers, in other words, might provide powerful justifications for the approach that the Court's textualist Justices have taken to jurisdictional statutes. But these justifications are in substantial tension with textualists' claims about faithful agency as the ordering principle of the judicial role.

### *c. Results-Oriented Interpretation*

Yet another possible explanation for the selective application of textualist methodology to jurisdictional statutes is the realist critique that Justices are results-oriented. Many assert that

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<sup>355</sup> Scalia, *supra* note 9, at 27–29. Justice Scalia has also insisted that a "text should not be construed strictly," but rather should "be construed reasonably, to contain all that it fairly means." *Id.* at 22. On the other hand, Justice Scalia has applied clear-statement rules in order to effectuate federalism norms, see, e.g., *Dellmuth v. Muth*, 491 U.S. 223, 233 (1989) (Scalia, J., concurring), and to enforce structural protections for individual rights, see *Hamdi v. Rumsfeld*, 542 U.S. 507, 574 (2004) (Scalia, J., dissenting).

<sup>356</sup> See *Grable*, 545 U.S. at 321 (Thomas, J., concurring) ("Jurisdictional rules should be clear."); Nelson, *What is Textualism*, *supra* note 70, at 383–98, 402 ("Faced with uncertainty about how rule-like Congress meant a particular directive to be, textualists may tend to resolve their doubts in a way that shifts fewer important decisions from politically accountable members of Congress to politically insulated courts."). Of course, one could just as easily follow a competing rule—such as a presumption in favor of jurisdiction when granted—to achieve the same benefits of rules-based decision-making.

<sup>357</sup> See, e.g., SCHAUER, *PLAYING BY THE RULES*, *supra* note 87, at 51–52; Sullivan, *supra* note 87, at 57–69; cf. David Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 925 (1992) (arguing that the interpretive canons that "have played the most significant role in the process of construction are those that . . . emphasize the importance of not changing existing understandings any more than is needed to implement the statutory objective," and that the "judicial tendency to favor continuity over change is, on the whole, a desirable one").

<sup>358</sup> See Manning, *Non-delegation Doctrine*, *supra* note 68, at 707–19.

the Court has a general antipathy to litigation,<sup>359</sup> to plaintiffs or particular rights that they assert,<sup>360</sup> or to particular classes of cases, such as those within diversity jurisdiction.<sup>361</sup> It is possible, for example, that the Court's textualists have been particularly stingy in their constructions of the habeas statute because of their views about the likely substantive merits of habeas claims. It is difficult to substantiate such an account, however, as the Court's opinions rarely will invoke such a ground for decision. In any event, even if such hostility is a motivating force for the textualist drive to limit federal court jurisdiction, it is largely consistent with the judicial-constraint account provided here. The desire to trim the courts' docket of cases, most of which (on this account) are unwanted, is no different in practical effect than the desire to limit judicial authority because of concerns about the judicial role in a democratic system.<sup>362</sup>

### *B. Implications for Textualism*

In the end, it is difficult to explain the approach of the Court's self-professed textualists to jurisdictional statutes without returning to textualism's more general view about the exercise of judicial authority. The textualist Justices' selective application of their chosen methodology to jurisdictional statutes suggests that textualism, at least in practice, has been less about fidelity to Congress's legislative supremacy and more about constraining judicial authority.

If this account is correct, it reveals something about the core defenses of textualism. Textualists have not been shy about insisting that non-textualist approaches to statutory interpretation are inconsistent not only with the theory of faithful agency, but also with legislative supremacy, the concept of law, and democracy itself.<sup>363</sup> But the jurisdictional context reveals that these claims are at best overblown and at worst hypocritical. If self-professed textualist judges can read broad jurisdictional statutes according to something other than their

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<sup>359</sup> See Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme of the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097 (2006); Weinberg, *supra* note 112, at 1420–22; Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633 (1994).

<sup>360</sup> See Larry W. Yackle, *A Worthy Champion for Fourteenth Amendment Rights: The United States in Parens Patriae*, 92 NW. U. L. REV. 111 (1997).

<sup>361</sup> See Freer, *The Cauldron Boils*, *supra* note 288, at 60; Redish, *Abstention*, *supra* note 6, at 104 (describing judicially created exceptions to diversity jurisdiction as thinly-veiled attacks on the diversity jurisdiction).

<sup>362</sup> If the hostility account is correct, however, it undermines the claims of textualists, who argue that the approach will cabin judges' discretion to act politically. If judges can defy Congress's instructions—expressed plainly, in duly enacted statutory text—in order to achieve results that they prefer, then textualism's constraining influence is substantially diminished.

<sup>363</sup> See Scalia, *supra* note 9, at 17.

plain language, then perhaps they should temper their general insistence that government by something other than the plain language of legislative enactments is “tyrannical.”<sup>364</sup>

Yet this account is not necessarily fatal for textualism as a methodology of statutory interpretation. Even if textualism cannot always deliver on its promise of courts acting as faithful agents of the legislature, it still holds a powerful normative appeal as a way to operationalize a theory of judicial restraint.<sup>365</sup> Indeed, the jurisdictional context suggests that the textualist project has been more about limiting the judicial role than about faithful agency. But the account developed here should force defenders of textualism to acknowledge that, at least sometimes, the methodology does no better than other approaches to statutory interpretation at ensuring the faithful agency of the courts. It may well be that textualism nevertheless is defensible, but its proponents must be willing to argue that the desire to limit judicial authority is a sufficiently compelling end that the sacrifice to the notion of faithful agency is justified.<sup>366</sup>

The account presented here also has implications for textualists’ claims that their approach is superior to others at constraining judicial mischief.<sup>367</sup> Justice Scalia, for example, has warned that the threat of non-textualist approaches to statutory interpretation is that “under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field.”<sup>368</sup> Of course, whether textualism

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<sup>364</sup> *Id.*

<sup>365</sup> See Smith, *supra* note 23, at 1475.

<sup>366</sup> The account provided here may, however, suggest that textualism is misguided as a method for construing jurisdictional statutes. Indeed, the current collection of jurisdictional statutes provides a cautionary tale for any judge committed to textualism. Many are poorly drafted and, if read literally, would produce results that Congress could not plausibly have intended. See, e.g., Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 GEO. WASH. L. REV. 309 (2001) (discussing apparent error in 28 U.S.C. § 1391). Others when read literally are in obvious tension with Article III. See, e.g., Douglas D. McFarland, *The Unconstitutional Stub of Section 1441(c)*, 54 OHIO ST. L.J. 1059 (1993). As a result, several commentators have urged a more sympathetic reading of jurisdictional statutes, with an unapologetically more robust role for judges in the crafting of the jurisdictional regime. See Meltzer, *Judicial Passivity*, *supra* note 56, at 396 (“[N]ot only is it unrealistic to expect Congress to be able to resolve all issues up front in statutory text, but there are many instances in which a congressional effort to do so is likely to be less successful than leaving matters to be worked out by judicial decision.”); Siegel, *supra*, at 348–58, 366; Thomas D. Rowe, Jr., *1367 and All That: Recodifying Federal Supplemental Jurisdiction*, 74 IND. L.J. 53, 57–58 (1998); Pfander, *Supplemental Jurisdiction*, *supra* note 5, at 154–60.

<sup>367</sup> See *supra*, Part II.

<sup>368</sup> Scalia, *supra* note 9, at 17–18; see *id.* at 18 (calling “legislative intent” a “handy cover for judicial intent”); *id.* at 21 (calling purposivism “an invitation to judicial lawmaking”).

succeeds more generally as a constraining device is a question of substantial controversy,<sup>369</sup> as the textualists' claims are not easily testable without choosing some baseline—such as text, intent, or purpose, which of course assumes the conclusion—from which to measure deviation. But in the jurisdictional context, one could at least argue that the textualists' claims or constraint are vindicated in practice. Indeed, in one sense, a consistently applied presumption against jurisdiction might well help to reduce judicial discretion, in the sense that judges who are less likely to act at all are, *a fortiori*, less likely to act instrumentally.

This, however, is a difficult claim to sustain. First, the contention that there is little room for judicial mischief when judges conclude that they lack jurisdiction to proceed ignores the threshold interpretive question—whether Congress has, in fact, stripped the courts of jurisdiction to act. If the jurisdictional statute is more properly read to authorize jurisdiction—either because the language is susceptible to more than one interpretation, because Congress did not intend to divest the courts of jurisdiction, or for some other reason—then the court's refusal to entertain an action itself might amount to a form of judicial mischief. Second, the textualist judges' willingness to abstain from exercising jurisdiction that Congress appears, in light of the plain text of an enactment, to have conferred seems quite similar to the tendency that textualists regularly decry—the inclination of judges to substitute their will for that of Congress.

To be sure, the *aim* of such an interpretive approach may well be in the service of judicial minimalism. But that does not mean that it is not a form of judicial willfulness. In some cases, Congress plausibly has attempted to confer jurisdiction in order to promote some policy goal by using the tool of litigation, and judicial refusal to participate frustrates the legislative judgment. And even if one assumes that judicial abstention is always policy-neutral, it is at least inconsistent with the notion of faithful agency and legislative supremacy. The merits of those ideas may well be debatable.<sup>370</sup> But if textualists continue to assert that their approach is uniquely consistent with faithful agency and legislative supremacy, it is fair to evaluate textualist judges' actual decision-making according to the extent to which it advances them.

### *C. Implications for the Congressional-Control Model of Federal Jurisdiction*

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<sup>369</sup> See *supra* at note 88 and accompanying text.

<sup>370</sup> See *supra* Part I.B.



Chief Justice Marshall famously argued that the federal courts “have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.”<sup>371</sup> But the account developed above suggests that in practice, textualist judges have been substantially more willing “to decline the exercise of jurisdiction which is given” than “to usurp that which is not.”

The long-standing debate about Congress’s power to control the jurisdiction of the federal courts is unlikely to be resolved any time soon. But because textualism—particularly as applied in practice—has been largely about the courts’ relationship to Congress, the rise of textualism is important to the ongoing debate, at least as a positive matter.<sup>372</sup> The tendency of the Court’s textualists to construe jurisdiction-ousting statutes more strictly than jurisdiction-conferring statutes suggests that although the textualists have accepted the strong congressional-control model for jurisdiction-*stripping*, they see a substantially more robust role for the federal courts on the abstention side of the debate. And any consideration of Congress’s power to control the jurisdiction of the federal courts must account for the Supreme Court’s active role in effectively limiting the jurisdiction of those courts.<sup>373</sup> At least as a positive matter, David Shapiro’s view that courts ought to exercise discretion in deciding whether there should be jurisdiction in a particular case—and not Redish’s visions of absolute legislative supremacy—appears to have prevailed.<sup>374</sup>

To be sure, virtually all of the cases discussed above relate to congressional control over *lower-court* jurisdiction; Congress has rarely put the Court squarely to the test of addressing the mandatory scope of its appellate jurisdiction or the extent of Congress’s power under the

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<sup>371</sup> *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

<sup>372</sup> In offering thoughts about the implications of textualism in practice, I take to heart Cass Sunstein’s admonition that normative questions about the proper judicial role in statutory interpretation cannot be comprehensively addressed without attention to pragmatic questions. See Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636 (1999); cf. Daniel J. Meltzer, *Judicial Passivity*, *supra* note 56, at 382–83: (arguing that “simple appeals to democracy or structure set forth in a constitution (federal or state) for the enactment of legislation cannot itself answer the question of the appropriate judicial role”).

<sup>373</sup> See Weinberg, *supra* note 112, at 1408–09 (“The Supreme Court is by far the more active source of door-closing rules in constitutional and other federal cases. . . . [T]he Court’s door-closing jurisprudence must, however imperfectly, be relevant to any consideration of Congress’s door-closing powers.”).

<sup>374</sup> See Shapiro, *Jurisdiction and Discretion*, *supra* note 7, at 574–75 (“[A]s experience and tradition teach, the question whether a court must exercise jurisdiction and resolve a controversy on its merits is difficult, if not impossible, to answer in gross. And the courts are functionally better adapted to engage in the necessary fine tuning than is the legislature.”).

Exceptions Clause,<sup>375</sup> and any suggestion about how the Court’s textualists would respond is mere speculation.<sup>376</sup> But the textualists’ approach to jurisdictional statutes more generally suggests that their concern about limiting federal judicial power would lead most textualists to advance a strong congressional-control model for the Exceptions Clause, as well.

We need not speculate, however, about the textualists’ views about the power of the courts to decline to exercise jurisdiction that Congress ostensibly has granted. As demonstrated above, although the rise of textualism has had a pronounced effect on the strictness with which the Court’s textualists interpret jurisdiction-ousting statutes, the Court’s textualists have not similarly insisted consistently on strict obeisance to Congress’s instructions in statutes conferring expansive jurisdiction. Notwithstanding the rise of textualism—or perhaps because of it—Congress’s power to control the jurisdiction of the federal courts, it appears, turns at least in part on Congress’s willingness to further the project of limiting judicial authority.

## CONCLUSION

Textualists have in many respects redefined the debate about the appropriate judicial role in matters of statutory interpretation. In so doing, they have also shaped the debate about the proper relationship between Congress and the federal courts. Although textualists speak with confidence about the courts’ role as faithful agents of Congress, application of the approach in practice to jurisdictional statutes has suggested that the textualist view of the judiciary’s relationship to Congress is somewhat more ambivalent. The notion of faithful agency, it turns out, risks increasing judicial authority, when Congress seeks to confer it; but textualism, in both theory and practice, has been largely focused on limiting judicial authority. And when faithful agency has conflicted with the urge to limit judicial power, the latter has prevailed.

As a positive matter, this suggests that the answer to the question of the extent of Congress’s control over the jurisdiction of the federal courts varies depending on whether

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<sup>375</sup> In *Felker v. Turpin*, 518 U.S. 651 (1996), the Court avoided resolving whether AEDPA’s limits on the Court’s power to review certain lower-court judgments deprived the Court of appellate jurisdiction in violation of Article III. The Court concluded that Congress had not purported to strip the Supreme Court of its “original” jurisdiction to grant habeas petitions, and thus that Congress had not fully deprived the Court of jurisdiction to consider petitions for habeas corpus. *Id.* at 658–61 (discussing *Ex Parte Yerger*, 8 Wall. 85 (1869)).

<sup>376</sup> Justice Scalia offered his most forceful endorsement of the congressional-control model in a case involving a congressional limitation on the jurisdiction of the lower federal courts. *See Webster v. Doe*, 486 U.S. 592, 611–15 (1988) (Scalia, J., dissenting).

Congress seeks to grant authority to the federal courts or instead to deprive them of it. This is certainly not an indefensible view of the long-standing question of the congressional role in crafting a jurisdictional regime. But it is not the view that one might expect as the product of strict adherence to textualism, with its insistence on the faithful-agent model of the courts. If indeed textualism is more about constraining judicial authority than it is about faithful agency, its proponents should develop a normative defense of the approach that acknowledges those objectives and accounts for the attendant theoretical costs. A richer account of textualism can only advance the project of understanding the courts' relationship to Congress, and in so doing can help us to develop a fuller account of the extent of Congress's authority to control the jurisdiction of the federal courts. Until then, we must take textualists' most sweeping claims with a grain of salt.